No. 16128

In the United States Court of Appeals for the Ninth Circuit

CHARLES W. CARLSTROM, SOUTHERN CALIFORNIA CHILDREN'S AID FOUNDATION, INC., A CORPORATION, SOUTHERN CALIFORNIA DISTRICT COUNCIL OF THE ASSEMBLIES OF GOD, INC., A CORPORATION, AND THE SALVATION ARMY, A CORPORATION, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES, APPELLEE

PERRY W. MORTON,
Assistant Attorney General,
LAUGHLIN E. WATERS,
United States Attorney,
Los Angeles 12, California.
ALBERT N. MINTON,
Assistant United States Attorney,
Los Angeles 12, California.
ROGER P. MARQUIS,
A. DONALD MILEUR,
Attorneys,
Department of Justice, Washington 25, D.C.

FILED
OCT - 9 1959
PAUL P. O'BRIEN, CLERK

INDEX

CITATIONS

Cases:

Cases—Continued

Cases—Continued

Miscellaneous:

In the United States Court of Appeals for the Ninth Circuit

No. 16128

CHARLES W. CARLSTROM, SOUTHERN CALIFORNIA CHILDREN'S AID FOUNDATION, INC., A CORPORATION, SOUTHERN CALIFORNIA DISTRICT COUNCIL OF THE ASSEMBLIES OF GOD, INC., A CORPORATION, AND THE SALVATION ARMY, A CORPORATION, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES, APPELLEE

OPINION BELOW

The opinion of the District Court is reported *sub nom., United States* v. *70.39 Acres of Land,* 164 F. Supp. 451. Although not germane to the present appeal, an earlier opinion of this Court involving a tax matter arising out of the same case is *County of San Diego* v. *United States,* 251 F. 2d 534 (1958).

JURISDICTION

This is an appeal from the final judgment of the district court in a condemnation proceeding entered on November 26, 1957 (R. 255–300). Notice of ap-

peal was filed by the defendants Charles W. Carlstrom; Southern California Children's Aid Foundation, Inc.; Southern California District Council of the Assemblies of God, Inc.; The Salvation Army, a California corporation; and The Salvation Army, a New York corporation (herein collectively "appellants" unless otherwise indicated), on March 12, 1958 (R. 301–302). Although it was not included in the printed record, the defendants filed a motion for a new trial on the issues of just compensation on December 3, 1957, which was denied on January 20, 1958.[1] The jurisdiction of the district court over the condemnation proceeding rested on 28 U.S.C. sec. 1358. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether the consolidation of term and fee takings of the same property for a single trial by the district court was an abuse of discretion.

2. Whether the cost of rehabilitating the property for its highest and best use is admissible in evidence.

3. Whether the district court properly eliminated from cross-examination repetitious and remote questions which threatened to prolong the trial unduly.

4. Whether the district court was in error to reject detailed figures as to reproduction costs when other evidence of a more reliable character was available.

---

[1] The United States had filed a motion for new trial as to Tract A–106 which was granted on March 14, 1958, unless all interested parties filed a remittitur for everything over $8,000. Such remittitur was subsequently filed.

5. Whether leases made by a government contractor to secure space urgently needed for the manufacture of military aircraft during a national emergency may be considered as evidence of fair market value.

6. Whether the district court was correct in ruling that (a) a previous sale of the same property and the landowners' admissions against interest in a tax proceeding were admissible and (b) evidence of the rental value of the property 14 months after the date of taking was not admissible.

STATEMENT

In this eminent domain proceeding the United States took, first, an estate for years and, subsequently, the fee in a portion of an aircraft plant at San Diego, California. The plant had been built by the United States during World War II for the use of Consolidated Vultee Aircraft Corporation, commonly known as Convair, which is now a division of General Dynamics Corporation. After the war the plant, variously referred to as Convair Plant #2, Consolidated Plant #2, or Plancor #20, was declared surplus and disposed of in several pieces. The original plant, complete, contained 92 acres (R. 1076). While approximately 70 acres were condemned, by the time of trial the just compensation for only 46.9 acres remained to be determined (R. 1054). This portion of the original plant consisted of three immense aircraft assembly buildings (identified in these proceedings as Buildings 1, 2 and 3), a paint shop (Building 7), a utilities building (Building 5), two office buildings (Buildings 4 and 24), two cafeteria buildings (Buildings 27 and 28), and a drop

hammer building (Building 8) (R. 494–499). These buildings contained approximately 1,565,266 square feet of floor space (Tr. 3036).[2] See Defendants' Exhibits Nos. 32 and 119 for area statistics on all buildings except No. 8 (R. 2166, 2190). The defendant, C. W. Carlstrom, had purchased the 46.9 acres and the buildings described above in May 1948 from the Government for $1,050,000 (R. 2169). Shortly after he purchased the property, Mr. Carlstrom sold Building 8 with 93,000 square feet of land for $108,900 (R. 2169). The major leases on the property between the date it was sold to Carlstrom and the term taking are set forth in Dft. Ex. No. 25–S, and in the testimony of Mr. Sayer (R. 1237–1286, 2160). Gross rentals of approximately $2,350,000 were received from these major leases up to the date of the term taking, May 1, 1953.[3] Over two million dollars of these rentals had been received from the Government's contractor, Convair, mostly under leases made after the beginning of the Korean War (*id.*).

The United States filed its original complaint in condemnation on April 29, 1953 (R. 3–8). The estate taken was a term for years commencing May 1, 1953, and ending June 30, 1954. It was extendible for yearly periods thereafter at the option of the United States until June 30, 1958, with notice of its election

[2] When the reference is to the printed record, the initial "R." precedes the page number. When the reference is to portions of the reporter's official transcript of the trial which is in the record but not printed, the initials "Tr." precede the page numbers.

[3] Rentals from Parcel 1, Building 8, are excluded from this gross.

to be filed at least 30 days prior to expiration of the previous term (R. 5). With the complaint there was filed a declaration of taking of the interests described in the complaint (R. 7). At the time a large portion of the condemned property was already leased to and occupied by Convair. The proceedings were brought because the rentals were believed to be too high and because there were several lessees of other portions of the condemned property, some with unexpired terms running to as long as 1968. On May 19, 1954, the United States filed its notice of election to extend the term for a one-year period from July 1, 1954, to June 30, 1955 (R. 257–258). Another notice of election to extend the term for one year from July 1, 1955, to June 30, 1956, was filed on May 31, 1955. Before this last term commenced, however, the United States filed its declaration of taking to enlarge the term taking to a taking in fee simple (R. 258). In some instances there were delays of several months after the required proceeding was instituted before possession was delivered to the United States. The various proceedings relating to the granting of possession and holding over of certain lessees will not be covered fully here as it is not important to the issues on this appeal. Prior to May 1, 1953, Mr. Carlstrom had conveyed to various charitable organizations the fee and appurtenant easements for individual buildings in the condemned plant. Insofar as pertinent, the consideration for these conveyances and the circumstances surrounding them will be developed later. Those owners or lessees found to have an interest in the term taking that had not

been previously settled by stipulation are set forth in the final judgment (R. 281–283). Those instances where settlements have been stipulated are also set out in the final judgment (R. 294–296). To distinguish the two, the property included in the term taking is described in "parcels", while the property in the fee taking is described in "tracts".

At pre-trial hearings and during the trial numerous questions of law were raised by the many lawyers representing the various defendants and the United States. To a large extent the questions of law were disposed of before the trial started in January 1957. The rulings of the district court on these issues of law are mostly covered by four pre-trial orders and supporting memorandums. These orders and memorandums are reported in *United States* v. *70.39 Acres of Land,* 164 F. Supp. 451 (S.D. Cal., 1958). Pre-trial orders Nos. 1 and 4 are relatively unimportant, being concerned with procedural matters. The bulk of the rulings is in Pre-Trial Order No. 2, covering those issues of law on the term taking, and Pre-trial Order No. 3, similarly covering the fee taking.

The case was tried before a jury which returned the following verdict (R. 260–261):

Parcel No.	Fair market value of 14-month term	Fair market value of option to renew	Parcel No.	Fair market value of 14-month term	Fair market value of option to renew
5	$62,000	$17,712	9-A	315,000	90,000
6	185,000	52,856	9-B	700	200
7	202,000	57,684	X	12,000	3,428

Tract No.	Fair market value	Tract No.	Fair market value
A-100	$275,000	A-108	$122,000
A-101	1,146,000	A-109	195,000
A-102	2,830,000	A-120	22,000
A-106	30,000	A-121	208,000
A-107	49,000		

Based on the jury's award for the 14-month term, the court made the following award (12/14ths less abatement) for the extended 12-month term (R. 275):

Parcel No.	*Amount*
5	$50,928.55
6	151,964.24
7	165,928.53
9-A	258,749.92
9-B	575.00
9-C (less that portion thereof designated Tract A-119 in the fee acquisition)	5,980.00
X	9,857.14

In addition to the awards based on the jury verdicts, the following parcels and tracts were settled by stipulation (164 F. Supp. 451, 460):

Parcel 1, term taking (same property as Tract A-100 in fee)	$76,552.07
Parcel 9-C, term taking	14,880.00
Parcel 10-A, term taking (Midway)	23,034.15
Parcel 10-A, term taking (Ace Van)	1,552.85
Tracts A-110-119, fee taking	69,300.00
Tract B-200, fee taking (Ace Van)	61,750.00
Tract B-201, fee taking (Midway)	617,500.00

An appeal from the judgment of the district court was taken as to all tracts and parcels tried before the jury except Parcel 1, Tract A–100 (Building 8), and Parcel A–119 (part of the railroad spur appurtenant to Building 8). Although the notice of appeal mentions Tract A–100, the appellants have no interest in this tract (R. 301–302, 290).

The case presented to the jury

While appellants' principal point is that the jury was confused, their brief fails completely, we believe, to set forth a statement of the case which gives any fair summary of what occurred at the trial. Almost every paragraph of the little more than three pages which, according to the index of the brief, is the statement of the case required by Rule 18(2)(c) of this Court, contains argumentative charges of confusion. We believe, therefore, that a rather detailed statement in chronological order is required. In testing the validity of appellants' claim of confusion it should be borne in mind that the evidence, as we relate it, was presented to the jury in a period from January 2 to May 27, 1957, with some recesses, during which the jurors would naturally develop detailed knowledge as to the plant and its surroundings.

There is printed in the record, between pages 364 and 2197, the essential case presented to the jury, with cumulative materials eliminated to the best of counsel's ability. Insofar as pertinent to issues other than complexity of the jury case, certain portions of the record between the above-mentioned pages contain matters presented outside the hearing of the jury.

There are also printed in Volume VI of the record those exhibits which are principally summaries of the experts' testimony on fair market value of the property taken and comparable sales and rentals.

As the jury was being chosen, the district court explained the general nature of the case and the issues to be decided (R. 364–375). The court told the jury the case was both simple and complex. It was simple in that there were only simple issues to decide. Stated generally, the issue as to the fee taking was "when the Government took the entire title what was the fair market value of this property?" (R. 364). The other issue was the fair market value of the leasehold which the Government took. "* * * you will have to decide what the fair market value of the 14 month leasehold was and the fair market value of the option to renew" (R. 365). The case is complicated "in that there is involved a large piece of ground and parts of a large industrial plant, large buildings and equipment" (R. 365). The district court informed the jury that three things were taken, a lease beginning May 1, 1953, for 14 months, and an option to renew that lease from year to year until 1958, the renewal of the lease for the second year, and then the taking of the fee title about two weeks before the second term expired (R. 367). "You are not to be concerned with the apportionment of values which you may place on certain parcels between various people * * *," the court warned, "your function is to decide what the particular parcels were worth * * *" (R. 367–368).

the County of San Diego, viz, Plant 2 or Plancor 20, to park on Parcel 10A (R. 390). This right to park free of charge was limited to 6 a.m. to 6 p.m. Mondays through Fridays, and ran until approximately 1962 (R. 390). The parking privilege was available for 3,000 cars (R. 394). Mr. Burrill stated the position of the defendants that the highest and best use of each parcel was as part of a unitized airplane manufacturing plant (R. 409). Mr. Burrill pointed out that there was nothing on the ground at the plant to mark the various parcels, or to designate the inplant road (R. 410). All the plant area not covered by buildings is surfaced with concrete or macadamized pavement (R. 411).

The next attorney to make his opening statement for the defendants was Mr. Janofsky, representing Children's Aid Foundation and Assemblies of God (R. 420). Mr. Janofsky reiterated the buildings owned by his clients and further described them (R. 421–427). Mr. Janofsky stated defendants' position that the leases of portions of the plant made to Convair prior to condemnation were among the best evidence of the highest and best use of this property (R. 431). The defendants also intended to offer the leases to support their figures on fair market rental value (R. 440).

Mr. Horton, representing the former owners of Parcel 1, Building 8, the drop hammer building, made a brief opening statement (R. 441–444). Mr. Horton told the jury that his client, the fee owner, was not interested in the leasehold taking because that taking was a matter between the Government and his client's

tenant (R. 442). He explained the nature of a drop hammer and the physical condition of this property (R. 442–443). He also noted the railroad siding available to this parcel and the parking privileges (R. 443–444).

Mr. Moran, representing Convair, and Mr. Archer, representing Lyon Van and Storage which was leasing a portion of Building 1 on the date of taking, were not allowed as lessees to be heard unless the other parties were not adequately presenting the case (R. 399, 444).

The opening statement for the Government was made by Mr. McPherson (R. 446–482). Mr. McPherson first concerned himself with the question whether the individual parcels taken could be unitized (R. 451). Mr. McPherson noted that the original plant contained 92.8 acres and had 50 structures, although approximately 20 of these were minor structures of no consequence (R. 451). The plant was designed as an auxiliary to Convair's main plant, No. 1, Plant No. 2 being used as a subassembly or parts assembly plant (R. 451–452). Of the total area in the original plant under roof, 2,470,000 square feet, 821,000 square feet was sold to the County of San Diego, or others, or retained by the Government, while Mr. Carlstrom received 1,649,000 square feet with his purchase (R. 454–455). 23.6 acres of the original plant land area was in the parking lot (R. 452). This was sold to the San Diego baseball club, with parking privileges for not to exceed 3,000 cars reserved for employees of any business conducted in the original plant for a period

525540—59——2

of 15 years (1962) (R. 455–456). Mr. McPherson described the buildings in the area sold to Mr. Carlstrom (R. 456–459). After Mr. Carlstrom acquired the property, he sold Building 8 to Gregory Electric on June 17, 1948 (R. 459). On December 27, 1952, Mr. Carlstrom made an outright gift of Building 28, the cafeteria building, to Salvation Army (R. 461). Mr. Carlstrom also made a series of partial gift transfers in 1951 to the Assemblies of God of Buildings 2, 3 and 4 (R. 462). Mr. Carlstrom made complete gifts of Buildings 24 and 27 to Children's Aid Foundation (R. 462). An important feature of these gifts and partial gift and sale transactions was the Easement Plan Agreement (R. 463). Each of the buildings in the plant was served by numerous service facilities, sewer lines, water lines, power lines, gas line, steam lines, etc. (R. 464). Around each of the buildings conveyed, Mr. Carlstrom reserved to himself a strip of land so that the right of access to and from these buildings was very limited (R. 464–465). The Easement Plan Agreement required the severance by Assemblies and Salvation Army, after they got Building No. 1, of these service facilities within 180 days after demand by Mr. Carlstrom (R. 466–467). Mr. McPherson pointed out that the vehicular overpass was not conveyed to Mr. Carlstrom except as to the abutments resting on his land, and that the other abutment was on land of the United States (R. 469). The court interrupted Mr. McPherson's opening statement when he mentioned comparable sales and leases to explain what these terms meant (R. 472). Mr. McPherson then generally discussed comparable sales

and leases (R. 473–477). Mr. McPherson concluded with general remarks on highest and best use (R. 478–482).

At the conclusion of Mr. McPherson's opening statement, the district court elaborated on a reference to the 14-month term and the subsequent 12-month term. Value would be determined by the jury for the 14-month term and the option to renew. The 12-month term would then be ascertained by taking $^{12}/_{14}$ths of the jury's award for the 14-month term (R. 482–485).

Condition of property on May 1, 1953

The first witness called by the appellants was John M. Burlake who testified as to the condition of the condemned property, except Parcel 1, Building 8, on May 1, 1953 (R. 486–669). Mr. Burlake was an appraiser with the American Appraisal Company and gave the usual statement of qualifications [5] (R. 486; Tr. 752–761). Mr. Burlake was familiar with and had examined in great detail all the buildings involved in the trial except Parcel 1, Building 8 (R. 487). Mr. Burlake first visited the property in the fall of 1952, and later in May 1953 and June 1955 (R. 487–491). Mr. Burlake gave the measurement of the buildings and described the grounds outside the buildings (R. 495–505). The outside area was generally paved with asphaltic concrete pavement (R. 500). On the easterly side of the property was a standard gauge railroad industrial siding. (*Id.*) There were two large

[5] Since the qualifications of expert witnesses are not at issue on this appeal, they have been generally omitted from the printed record.

wooden tanks and concrete pump houses at both the north and south end of the plant (R. 502–503). There was explained in great detail the physical characteristics of the three large buildings, all of which were similar except that Building 3A was annexed to Building 3 (R. 506–549). The buildings were 36 feet high having mezzanines above the ground floor at the side of the buildings, which were 40 feet wide, and run the full length of the buildings in two tiers (R. 507, 508, 520). The buildings were resting on large steel piles, with a reinforced concrete platform poured on top (R. 511–513). The framing of the buildings was steel and had a "skin" of corrugated, galvanized steel (R. 517–519). A portion of Building 1 was closed off by tenants who rented part of the building (R. 522). A series of doors opens up the end of the buildings (R. 524). Within the buildings and connecting between them is a craneway system designed so that it can cover in one run all the way from the north end of Building 3 to the south end of Building 1, traversing Building 2 in the process (R. 525, 527). The buildings are wired with numerous electric lighting and power facilities (R. 530–533). Each building has five large elevators (R. 533). Mr. Burlake next described Building 7, the paint shop, which was in a straight line with the three main assembly buildings previously described (R. 549–557). It was similar in basic construction and design with the other buildings (R. 550). Building 5, the utilities building, is located north of Building 3 and is a metal clad steel frame building similar to the other buildings (R. 557–565). The equipment in Building 5 includes three

steam boilers and auxiliaries, a water heater, water softening system, vacuum pump, three steam pumps, cellar drainer pump, two air compressors, an air conditioning unit, two 20 kilowatt DC motor generators, and to the north of the building are six 10,000-gallon steel underground tanks for gasoline and diesel oil (R. 561–564). Building 4 is a two-story steel frame building with stuccoed exterior walls (R. 572). The interior is plaster. There are continuous runs of steel sash windows, and the floors are finished with asphalt tile mostly (R. 574–575). The next buildings described were numbers 27 and 28, the cafeteria buildings which were practically duplicates of each other (R. 578–583). These buildings were not built on steel piles as the other buildings were (R. 579). They were wood framed with the exterior a flat sheet asbestos siding (R. 580). The interiors of the buildings were divided into serving, kitchen and dining areas (R. 581). Building 28 contained a refrigerator and other cafeteria equipment, but Building 27 did not and was being used for other purposes on the date of valuation (R. 581–583). The last building Mr. Burlake testified about was Building 24 (R. 583–586). This was a one-story wood frame building used for office purposes. It had no masonry foundations and rested on mud sills (R. 584). Mr. Burlake then described the various systems found in the yard area, sewer lines, air lines, storm drains, telephone lines, oil lines, domestic water system, sprinkler supply system, water tanks, natural gas distribution system, fire alarm system, steam lines, electrical distribution system, and public address system (R. 586–608). Mr. Burlake was next

questioned on the condition of the various buildings and improvements as of May 1, 1953 (R. 610–669). The cross and redirect examination of Mr. Burlake is not printed (Tr. 983–1022). Cross-examination is generally not included in the printed record since it is by its nature merely elaboration of basic information already presented to the jury.

The former owners of Parcel 1, Building 8, called Bruce Stallard to testify on the physical condition of their property as of the date of taking (R. 669–670). Since these defendants are not parties to this appeal, the complete account of the testimony is not printed (Tr. 1025–1054).

The United States called John E. Hallock as its expert witness on the physical condition of the property as of May 1, 1953 (R. 671–1005). Mr. Hallock was an engineer with the Donald R. Warren Company (R. 672). The witness' qualifications have been omitted (Tr. 1054–1060). Mr. Hallock first visited the property in November 1953 (R. 673–674). If Mr. Hallock were asked to describe the structural elements of the buildings, how they were put together, etc., it would be approximately the same as Mr. Burlake's (R. 676). This was also true of Mr. Stallard's testimony on Parcel 1 (R. 677). Mr. Hallock determined in his examination of the property what would be required for repairs to bring it up to a normal standard for carrying on industrial or commercial work in these buildings (R. 677–678). To illustrate his testimony there was introduced in evidence a series of photographs showing specific defects in the property (R. 688–690). The United

States later called Henry D. Smith, plant engineer for Convair at San Diego, who testified that in his opinion the photographs represented the condition of the plant on May 1, 1953 (R. 713–714). The condition of each building and the defects found therein were itemized by Mr. Hallock as follows: Building 1 (R. 690–722), Building 2 (R. 722–730), Building 3 (R. 730–737), Building 4 (R. 737–751), Building 5 (R. 751–758), Building 7 (R. 758–765), Building 24 (R. 765–768), Building 28 (R. 768–771), and yard paving and facilities (R. 771–785). Mr. Hallock did not testify on either Building 8 or Building 27 (R. 785). While covering only a small portion of Mr. Hallock's testimony on condition of the plant, the following are typical items: In Building 1 there were in excess of 4,000 cases of broken glass (R. 693). The interior underside of the roof and the whole roof structure need painting to prevent corrosion (R. 697). The unit heaters which heated the buildings had been severely used and were damaged (R. 705–706). The panels for the electric system were damaged or missing or had faulty circuit breakers in some instances (R. 715–716). In Building 2 the underground soil and waste lines and the sewer lines under the floor had been damaged due to settlement of the soil, as was true of Building 1 (R. 728). The catwalk over the roof of Building 3 was unsafe and needed much repair and painting (R. 733). In Building 4, 20,000 square feet of asphaltic tile was "of no use at all" (R. 737). The ceiling in Building 4 had sagged down, dropped out or was in waves (R. 742). Building 5, the power

questioned on the condition of the various buildings and improvements as of May 1, 1953 (R. 610–669). The cross and redirect examination of Mr. Burlake is not printed (Tr. 983–1022). Cross-examination is generally not included in the printed record since it is by its nature merely elaboration of basic information already presented to the jury.

The former owners of Parcel 1, Building 8, called Bruce Stallard to testify on the physical condition of their property as of the date of taking (R. 669–670). Since these defendants are not parties to this appeal, the complete account of the testimony is not printed (Tr. 1025–1054).

The United States called John E. Hallock as its expert witness on the physical condition of the property as of May 1, 1953 (R. 671–1005). Mr. Hallock was an engineer with the Donald R. Warren Company (R. 672). The witness' qualifications have been omitted (Tr. 1054–1060). Mr. Hallock first visited the property in November 1953 (R. 673–674). If Mr. Hallock were asked to describe the structural elements of the buildings, how they were put together, etc., it would be approximately the same as Mr. Burlake's (R. 676). This was also true of Mr. Stallard's testimony on Parcel 1 (R. 677). Mr. Hallock determined in his examination of the property what would be required for repairs to bring it up to a normal standard for carrying on industrial or commercial work in these buildings (R. 677–678). To illustrate his testimony there was introduced in evidence a series of photographs showing specific defects in the property (R. 688–690). The United

States later called Henry D. Smith, plant engineer for Convair at San Diego, who testified that in his opinion the photographs represented the condition of the plant on May 1, 1953 (R. 713–714). The condition of each building and the defects found therein were itemized by Mr. Hallock as follows: Building 1 (R. 690–722), Building 2 (R. 722–730), Building 3 (R. 730–737), Building 4 (R. 737–751), Building 5 (R. 751–758), Building 7 (R. 758–765), Building 24 (R. 765–768), Building 28 (R. 768–771), and yard paving and facilities (R. 771–785). Mr. Hallock did not testify on either Building 8 or Building 27 (R. 785). While covering only a small portion of Mr. Hallock's testimony on condition of the plant, the following are typical items: In Building 1 there were in excess of 4,000 cases of broken glass (R. 693). The interior underside of the roof and the whole roof structure need painting to prevent corrosion (R. 697). The unit heaters which heated the buildings had been severely used and were damaged (R. 705–706). The panels for the electric system were damaged or missing or had faulty circuit breakers in some instances (R. 715–716). In Building 2 the underground soil and waste lines and the sewer lines under the floor had been damaged due to settlement of the soil, as was true of Building 1 (R. 728). The catwalk over the roof of Building 3 was unsafe and needed much repair and painting (R. 733). In Building 4, 20,000 square feet of asphaltic tile was "of no use at all" (R. 737). The ceiling in Building 4 had sagged down, dropped out or was in waves (R. 742). Building 5, the power

plant, was in fairly good condition structurally, but the inertia blocks were causing trouble, and caused vibrations to a great extent in the rest of the building (R. 751–752). Partitions in Building 28 were gone and the cement floor in the kitchen area was so badly pitted that it was not conducive to cleanliness (R. 766). In the yard area there are a number of places where the paving has sunk to the extent that it no longer drains into the storm drain system (R. 772). Several parts of the public address system were missing (R. 786).

Mr. Hallock gave his opinion of the aggregate cost of bringing the property in this trial to a condition where it would be usable and useful for industrial purposes. The total of his estimated cost was rounded out to $1,478,600 (R. 801–802). The court gave the jury an instruction on how it was to consider this evidence, pointing out that it was not evidence of fair market value (R. 802–809). The costs of rehabilitation were merely factors which a willing buyer and a willing seller might consider. It was for the jury to decide whether those dealing in the marketplace would take into account in this instance the costs to put the property in a usable, suitable condition (R. 803). Mr. Hallock was cross-examined at length on the details of the rehabilitation costs (R. 809–1005). There was a breakdown of each rehabilitation item by building, starting at page 840 of the record and continuing through page 944. A slightly revised summary of rehabilitation costs was given at the conclusion of this cross-examination reaching a grand total of $1,383,800, reduced from $1,478,600

he testified to on direct examination (R. 945–947). The other thing covered by cross-examination was Mr. Hallock's experience and background (R. 809–812).

Landowners' evidence on term taking

The following witness for the appellants was James H. Van Dyke (R. 1005–1016). Mr. Van Dyke testified that in his opinion the portion of Plant 2 in this trial "was suitable for industrial purposes, including the use of manufacture of airplane parts, aircraft components, subassemblies and final assemblies of all but the larger aircraft" (R. 1007). The summarization of the 10 factors on which Mr. Van Dyke's opinion was based was given at the conclusion of his direct examination (R. 1009–1010). These included the flexibility of production areas, ease with which the space could be utilized, adequate parking available, adequate inplant feeding, accessibility of receiving and shipping materials and products manufactured, good circulation between the buildings, good storage space adjacent to the production areas, well distributed toilet facilities, adequate office space and room for other supporting facilities, and excellent material handling facilities. Mr. Van Dyke's opinion was based only on the areas of the plant here at issue except Parcel 1, Building 8 (R. 1010–1011). The exclusion of Parcel 1, and the area now owned by the County and the United States to the north of the plant, would not change his opinion. These areas would be desirable but not absolutely necessary (R. 1012–1013). Most of Mr. Van Dyke's testimony, both

direct and cross, has been excluded from the printed record (Tr. 1489–1642).

The court followed Mr. Van Dyke's testimony on the highest and best use for a unitized plant with a discussion on unitization addressed to the jury (R. 1016–1026). The court summarized the diverse positions of the defendants that there was a reasonable probability that all the property in the term taking could have been joined in a unit, and the Government's position that the property being split into different ownerships it was not reasonably feasible to unitize it (R. 1016–1017). The court stated that it was a question for the jury to determine whether this property was reasonably susceptible of unitization in the immediately foreseeable future after May 1, 1953 (R. 1017). The property could be unitized only if the various owners, without the power of eminent domain, could agree and pool their interests (R. 1018).

Gladys Boyer was called as a witness by the appellant, Salvation Army (R. 1027–1029). Brigadier Boyer was an officer of the Salvation Army, and testified that at no time had the Salvation Army considered using Building 28, Parcel X, for its religious and charitable purposes. F. C. Woodworth was called by the appellant, Assemblies of God (R. 1029–1031). Mr. Woodworth was a district supervisor with Assemblies. Mr. Woodworth testified that Assemblies held Parcels 5, 6 and 7 for investment or income-producing purposes rather than for use directly in its church activities.

The first real estate expert to testify on fair market value of the term taking for the appellants was John

N. Sayer (R. 1049–1337). Mr. Sayer's qualifications appear in the original transcript at pp. 1914–1931. Mr. Sayer first told the work he did to prepare himself to form an opinion of the rental value (R. 1049–1078). He determined the nature of the estate taken (R. 1049). The physical property was inspected (R. 1049–1050). The assessed value for tax purposes and tax rates, including the possibilities of any changes, was investigated (R. 1050). Mr. Sayer secured information on other sales and leases in the San Diego area (R. 1050–1051). He formed an opinion of supply and demand for the uses of the subject property (R. 1051–1052). The location of the subject property was analyzed relative to residential areas, major highways, trackage facilities and downtown San Diego (R. 1052). The physical measurements of the individual parcels, buildings and open areas were measured and inserted in the record by stipulation (R. 1052–1060). Mr. Sayer secured an inventory of the items to be included in the appraisal (R. 1060–1061). He obtained estimates of the cost of reproduction of the property as of May 1, 1953 (R. 1061–1062). Mr. Sayer discussed "observed depreciation" and "functional depreciation" and explained to the jury what he meant by these terms (R. 1063–1064). Mr. Sayer ascertained the dates on which the buildings were erected and their remaining life (R. 1065). He studied a report by Mr. Van Dyke on the functional and design characteristics of the buildings (R. 1065–1066). Reports of the San Diego Chamber of Commerce pertaining to their economy were obtained (R. 1066). The owners and ten-

ants of the property were determined (including the purpose for which the owner had the property) and the rentals being paid (R. 1067–1068). Mr. Sayer secured information pertaining to parking facilities available (R. 1068). At this point there was introduced in evidence the parking agreement between the agencies of the United States and the San Diego baseball club relating to Parcel 10A, the parking lot across Pacific Highway from the plant (R. 1068–1078). The court explained its ruling to the jury that the parking agreement allowing 3,000 cars to park between 6 a.m. and 6 p.m., Mondays through Fridays, for a period of 15 years accrued to the benefit of the entire 92 acres in Plancor 20, of which the 46 acres on trial here are a part. "So the ruling of the court was that the property shown on Exhibit A * * * as part of its value has the benefits, such as they are, flowing from this agreement, Exhibit 7" (R. 1077). The provision in the deed was read to the jury (R. 1074–1075). As a result of his studies, Mr. Sayer arrived "at certain things which [he] considered or did not consider * * *" (R. 1078–1079). He took into consideration the terms and conditions of the leasehold estate taken, including the option to extend for four yearly periods (R. 1079). He considered the location of the property with respect to downtown commercial areas and residential areas (R. 1079–1080). He considered the accessibility of the subject property to surrounding streets, highways, and freeways (R. 1080). A detailed discussion of this access followed (R. 1081–1096). Mr. Sayer considered the physical facilities, the type, size, and layout of the

improvements and the fixed building equipment (R. 1096). Leases and sales of other properties in the San Diego area were considered, with various degrees of weight being given to such data because of lack of comparability (R. 1097). There were introduced in evidence by the defendants pictures of various buildings at the plant (R. 1097–1105). Mr. Burrill then introduced in evidence Exhibit 10, a map showing comparable sales (R. 1104–1105).

At this point, the court discussed the significance of whether the property could be unified when considering whether a sale was comparable or incomparable (R. 1105–1108). It was the defendants' contention that the property could be unitized, with over 46 acres of land, and therefore there are no sales comparable to this unit. It was the contention of the United States that the property would have to be sold or leased as parcels or buildings, with the highest and best use of some of the large buildings being multiple tenancies. The court also reminded the jury that the owner was entitled to the highest and best use of which the property was susceptible regardless of actual use being made of it.

Mr. Sayer then proceeded to list the leases and sales he considered in arriving at fair rental value for the property involved in this trial (R. 1108–1294). The details of the individual leases and sales will not be reviewed in this statement. Insofar as these leases and sales were admitted in evidence for the jury's consideration, they are summarized in two exhibits. (See R. 1887–1888.) The leases considered by defendants' experts and applicable to the leasehold tak-

ing, i.e., those made before May 1, 1953, together with similar leases considered by plaintiff's experts, are collected in Exhibit 25–S (R. 2160; Tr. 3007–3008). The sales are shown on Exhibit 57 [6] (R. 2168). Prior to the trial, the Government and the defendants exchanged data on the transactions their experts considered (R. 1110). On Defendants' Exhibit 10, all the transactions were listed whether they were originally discovered by the Government or by the defendants (R. 1110–1111). Exhibit 10 covers leases and sales not only in the term taking but the fee taking as well (R. 1112). Therefore the court cautioned the jury that May 1, 1953, for the term, and June 16, 1955, for the fee, are cut-off dates and transactions appearing thereafter cannot be considered on the fair market value of the leasehold or fee (R. 1113). Mr. Sayer then identified by number the leases he had considered for the term taking (R. 1114–1118). He was then questioned on the details of each lease (R. 1118–1193). Next Mr. Sayer gave the list numbers and details of the sales he considered (R. 1193–1223).

At this point the court informed the jury that as the trial progressed it would try to give the jury some tentative instructions so they would know what counsel are shooting at in the case (R. 1223). This instruction was in connection with the leases between Convair and the defendant-owners of certain portions of the property involved (R. 1225). If these leases were free market transactions they could be consid-

[6] Sales occurring both before and after May 1, 1953, are listed on this exhibit. The witness testified as to which of the sales originally listed on Exhibit 10, and later on Exhibit 57, he considered (R. 1193–1201).

ered by the jury in arriving at the fair market value of the property (R. 1226). Whether they were free market transactions was a question for the jury. (*Id.*) The Government contended that they reflect an increase over fair rental because of the compelling necessity of the Government acting through its contractor, Convair. The defendants contend this is not true. The general rule is that the Government should not be required to pay for value which the Government itself has created. A distinction must, however, be noted. If, because of the Government's activities in and around San Diego, the Navy Base, Air Station, private plants doing government business, etc., there has been a general increase in rental and land values, then to the extent such general increase is reflected in the Convair leases the Government may not complain (R. 1226–1227). If, on the other hand, there is an increment in the Convair leases caused by the necessity of the Government acting through Convair for facilities of the particular kind and in the particular area close to Convair Plant No. 1, then such increment must be segregated by the jury and not considered in fair market value (R. 1227). The court then instructed that in considering capitalization of rental income it must be rental that could be expected over a sustained period (R. 1229). The jury was instructed to keep its eyes on the ultimate issue, fair market value (R. 1230). Comparable leases as to the leasehold taking and comparable sales as to the fee taking are the best evidence of fair market value. The court then noted the elements of comparability, distance from subject property, differences in size,

structure, access, date of the transaction, and other common sense factors (R. 1230–1231). If the jury finds there are no comparable sales or leases it may consider other matters to assist it in arriving at fair market value, such as opinions of experts and reasonable capitalization of net rental income if the jury is convinced that such rentals would have continued over a reasonably sustained period in the future (R. 1231).

Mr. Sayer then resumed with testimony that he considered the leases mentioned earlier not directly comparable, but they were helpful in various portions of the over-all appraisal (R. 1233). Mr. Sayer then testified on the various lease transactions of the subject property between Convair and the owners (R. 1234–1294).[7] Mr. Sayer stated that the leases C, F,

[7] These leases are as follows:

Lease C, Building 1, total area 211,000 square feet; term 59 months from April 1, 1951, to February 28, 1956, with option to cancel March 31, 1954; rental $5,000 for one month, $17,490 for 34 months, $16,600 for 24 months, cancellation bonus $95,000, average monthly rental for full term of 8¢ per square foot of leased area (R. 1237–1247).

Lease F, Building 2, entire building; lease dated January 10, 1951, and amended March 9, 1951; original term of lease 24 months, January 1, 1951, to December 31, 1952, amended term 52 months to April 30, 1955; option to cancel April 30, 1953; rental (as amended) $5,000 for one month, $18,725 for five months, $23,000 for 12 months, $30,300 for 10 months, $31,500 for the 24-month optional term, plus real estate taxes, average monthly rental for full term of 6.9¢ per square foot of leased area (R. 1247–1257).

Lease L, entire Building 3 and annex (3A); lease dated January 10, 1951, amended February 8, 1951; original term 28 months to April 30, 1953, option to renew for 24 months to April 30, 1955; January 10, 1951, lease superseded another lease of portions of building which had not expired (see Exhibit 25–S, R. 2160); rental for the firm term $15,056 per

L, O and N were, as a group, very comparable in his opinion to the property being tried in this trial (R. 1293–1294).

Mr. Sayer continued with the other factors he had considered in forming his opinion of the fair market rental value of the subject property. The next factor was ownership of the subject parcels with their size and characteristics with the thought of forming an opinion as to the probability of unitization (R. 1294–1295). At this point, the court interrupted to advise

---

month, optional term $34,237.50 per month plus real estate taxes, average monthly rental for full term of 5.6¢ per square foot of leased area (R. 1260–1265).

Lease M, 58,500 square feet of Building 4, the office building; lease dated February 8, 1951; term of 59 months April 1, 1951, to February 28, 1956, with option to cancel March 31, 1954; for the first 36 months the rental averages $11,196 per month, for the optional term $10,822.50 per month, cancellation bonus $65,000, average monthly rental for full term 18.9¢ per square foot of leased area (R. 1277–1281).

Lease N, the utility building, Building 5; lease dated January 10, 1951, superseded a prior lease which had not yet expired, amended February 8, 1951; original term 28 months to April 30, 1953, option to renew for 24 months to April 30, 1955; rental $1,500 per month (R. 1266–1269).

Lease O, entire Building 7; lease dated October 10, 1951; term of 59 months October 1, 1951, to August 31, 1956, with option to cancel September 30, 1954; average rental over first 36 months $5,147, cancellation bonus $15,900, last 23 months optional term at $5,300 per month, average monthly rental for full term 11.1¢ per square foot of leased area (R. 1269–1276).

Lease Q, 3,000 square feet of Building 24; lease dated December 1, 1952, terminated earlier lease which had not expired; term of nine months cancellable on 30 days' notice after May 31, 1953; rental $600 per month (R. 1283–1286).

Lease T–2, 6,000 square feet of vacant land for a term of one year from January 1, 1953, to December 31, 1953, rental $250 per month (R. 1825–1286).

525540—59——3

the jury that since unitization was a question for the jury to decide, it would not let the expert witnesses testify to their ultimate conclusion on unitization. The jury was entitled to hear all the facts and then make its decision without being told what the expert's opinion is (R. 1295–1296). Mr. Sayer considered the availability of free parking for nine years after the date of taking (R. 1296). Real estate taxes were considered (R. 1298). The cost of being a comparable facility and the depreciated reproduction cost were considered also (R. 1299).

Mr. Sayer was next asked his opinion of the highest and best use of the subject properties (R. 1300). The United States objected to this witness giving his opinion because there was nothing in the record to show whether there was a reasonable probability of the individual parcels being unitized, and no testimony at all on the highest and best use factors relating to separately owned parcels (R. 1300–1301). The court ruled there was no magic in the order of proof and that the expert could give his opinions and then his reasons (R. 1302). The jury then left the courtroom for argument of counsel (R. 1303). At the resumption of the jury hearings the court ruled that the question of unitization is a question of fact for the jury to determine. (*Id.*) Mr. Sayer then gave his opinion that the highest and best use of the subject parcels is for industrial use, including manufacturing, assembling and related activities (R. 1304). Mr. Sayer's opinion of the fair market rental value for the 14-month term was given (R. 1305–1326). The testimony was broken down by total rental, parking rights and value of the

option to renew. The figures will not be given here, as they are repeated in tabular form in Appendix A, attached to appellants' brief. The testimony was summarized for the jury in Defendants' Exhibit No. 28 (R. 2162).

Mr. Sayer concluded his direct testimony by giving the reasons for the values which he had expressed (R. 1326–1336). Prospective tenants would weigh the cost of reproducing or replacing a facility against rental cost of an existing property (R. 1327). The terms of the taking are favorable to the tenant, giving him the option to renew (R. 1327). The subject land has substantial plottage value because of the improbability of assembling another tract of 43 acres so close to downtown San Diego (R. 1327–1328). The size and design of the facilities of Buildings 1, 2, 3, 5, and 7 are adequate to meet the demands of utilization of this property for its highest and best use (R. 1328). Mr. Sayer, on whether the several parcels could be unitized, considered that there were only four owners, that the property was designed to be used as a single property, that prior to May 1, 1953, the property had already been substantially unitized, that the maximum use of the utility system—the craneway, rail facilities, yard and dock areas, powerplant and standby water tanks—could be had by unitization, that an advantage would accrue to the owners by leasing to a single tenant, and that other properties equally complex have within his experience been unitized (R. 1328–1332). The parking facilities available without cost enhance the rental value (R. 1332). Mr. Sayer considered the real estate taxes,

and stated that there is no tax protection clause in the lease (R. 1332). Mr. Sayer was permitted to give, over the objection of the United States, the assessed value of the property and the amount of taxes indicated thereby (R. 1333–1334). Mr. Sayer considered that the Government had the right to approve or disapprove each of the leases of the subject property (R. 1335). The rentals being paid under leases C, F, L and O of approximately 8 cents for ground floor area and 4 cents for mezzanine area compare favorably with Mr. Sayer's conclusions of 7 cents and 3½ cents respectively (R. 1335–1336). The cross and redirect examinations appear in the original transcript at pp. 2444–2633.

The next witness called on behalf of the appellants was real estate expert Ewart Goodwin (R. 1337–1364). Mr. Goodwin's testimony followed the same format as Mr. Sayer's. He gave his qualifications, his acquaintance with the property, the studies he made to prepare his appraisal, and the factors he considered in arriving at his opinion. Since the testimony was largely cumulative it has been omitted from the printed record (Tr. 2635–2696). Mr. Goodwin then testified that in his opinion the highest and best use of the subject property is for industry and manufacturing, including manufacture of small aircraft parts, assembly or manufacture of pleasure boats, furniture, and any sheet metal parts, and that the property was satisfactory not only for manufacturers of air frames such as Convair, but also Rohr, Solar and Ryan in the San Diego area (R. 1337). Mr. Goodwin gave his reasons for his opinion of the

highest and best use (R. 1338). These included that the design of the buildings was desirable for the particular purposes, that anyone using the buildings for this purpose would want a labor pool, including engineers, which is available in the San Diego area, that San Diego offers many "fringe benefits" to induce workers to come to this area, and that the "stretch-out" program of the United States adopted in 1952 and 1953 resulted in a stability in the aircraft industry not previously known, and it had a basic effect on the entire industry of the United States (R. 1338).

Mr. Goodwin gave his opinion of the fair market rental value for the 14-month term (R. 1338–1353). These figures were summarized for the jury in Defendants' Exhibit #29 (R. 2163). A résumé for this Court is given in Appendix A of appellants' brief. Mr. Goodwin continued his testimony with the reasons for the opinions of market value just expressed (R. 1354–1364). The property was ideal in shape and layout, lying between the Santa Fe Railroad and Pacific Highway (R. 1354). There was a good relationship between land and buildings, 1,075,000 square feet of land covered in buildings with a surrounding 734,000 square feet of vacant land area (R. 1354). The plant has "particularly desirable access for a property located on a high traffic street such as Pacific Highway" (R. 1357). The pedestrian overpass and the vehicular overpass to the south were considered (R. 1357–1358). The property was located four miles northwest of Fifth and Broadway in downtown San Diego (R. 1358). Industrial employment in San Diego was 50 per cent greater in May, 1953 than in

1950 (R. 1358–1359). There was a labor pool in San Diego, with an adequate supply of skilled workers, especially in metal work (R. 1359). At the date of taking there was very little close-in industrial land available (R. 1359). Mr. Goodwin considered the amount of penalty rent or bonus rent that should be paid for the option to cancel (R. 1360). The various sales and leases were not comparable, "worthy of comparison on the one hand; but, on the other hand, * * * they were capable of comparison in some respects" (R. 1361–1362). Because of the shortage of warehouse space a manufacturer would be justified in renting the entire property because there were many users for portions of the property with whom he could share the rent burden (R. 1362). San Diego enjoyed a growth between 1946 and 1953, with economic components such as retail sales, building permits, electric power sales and manufacturing employment, indicating very firm business conditions (R. 1364). The cross and redirect examinations are not given in the printed record (Tr. 2747–2818).

David F. Culver, another real estate expert, was called for the appellants following Mr. Goodwin (R. 1364–1381). Again the printed record is limited to the highest and best use and value opinions and the reasons therefor. The qualifications and preparations for the appraisal are omitted (Tr. 2835–2864). Mr. Culver found the highest and best use of the property to be for industrial uses, that is, assembly, subassembly or general manufacturing (R. 1364–1365). Mr. Culver then stated his opinion of fair market value for the 14-month term (R. 1365–1376). The figures were pre-

served for the jury in Defendants' Exhibit #30 (R. 2164). They are also included in Appendix A of appellants' brief. The reasons for the market value which Mr. Culver expressed were the tremendous growth in population and very substantial industrial development in the San Diego area (R. 1376). This substantiated his opinion that there was a demand for industrial properties in the area. The property being 46 acres in size, rather than a smaller area, was important (R. 1376). It was important that there were approximately 1,500,000 square feet of "building areas" (floor space) on the property (R. 1377). The buildings were in fair to good condition on May 1, 1953. The trackage available was important for this type of property. It was important that ownership was largely concentrated in two owners (R. 1377). Mr. Culver considered whether the owners were on friendly terms and the fact that from 1951 to May 1953 the major portion of the plant had been unitized. The Convair leases were important. The access he found important, the fact that the property has access to a service road paralleling Highway 101, and has adequate access in the southerly direction from Rosecrans Street, and also a two-way access to the south from Washington Street (R. 1378). Adequate parking facilities were available and parking rights running with the occupant or owner or lessee of the subject property. The term of the leases, 14 months, was for a period considerably less than would be the normal practice. The fact that the lessee had the option to renew at the same rental was important to Mr. Culver. Mr. Culver had information on a number

of sales and leases but did not consider any of these transactions directly comparable to the subject property with the exception of the leases of this property from 1951 to 1953 (R. 1378–1379). Mr. Culver considered the things that might be brought out in negotiations between the owner and a prospective lessee. These included the taxes, certain charges to management, vacancies, reasonable upkeep and repair, interest charges "contributable" to the land and improvement values, depreciation, and the parking value (R. 1379–1380). Another consideration that would be given substantial weight was what he would have to pay if he had the owner construct a new building (R. 1380). Also, the lessee would consider how much it would cost to build a new plant himself (R. 1380). The cross and redirect examinations have been omitted (Tr. 2885–2943).

The final witness on the term taking for the appellants was Charles B. Shattuck (R. 1381–1422). Mr. Shattuck's qualifications, knowledge of the subject property and what he considered in making his appraisal are not printed (Tr. 2949–2969). His testimony is, for present purposes, substantially the same as the earlier experts (R. 1382). Mr. Shattuck's opinion of fair market rental value was illustrated for the jury on Defendants' Exhibit #24 (R. 1385–1400). It is also included in the appendix to appellants' brief. This being the first exhibit giving a summation of the expert's testimony, the ones previously referred to being introduced later in the case, the court instructed the jury on their use (R. 1385–1386; Exhibit #24 is found at R. 2150). The summations

were merely illustrative and not direct evidence. They were to assist the jury later in the jury room in refreshing their recollection of the testimony, and so the jury could make comparisons of the testimony of the various experts. Mr. Shattuck then gave the reasons in support of the opinion of fair market value he had just given (R. 1401–1422).

Although none of the cross-examination of Mr. Shattuck has been printed (Tr. 3031–3109), there is one feature which must be noted. In accordance with the district court's ruling that expert witnesses must be prepared to testify to the value of the parcels on a segregated or unitized basis, Mr. Shattuck was asked on cross-examination for his figures on a segregated basis (Tr. 3079–3090). The summation of this testimony is found in Defendants' Exhibit #26 (R. 2161).

The above record concludes the case for the defendants on the term taking. There follows the case presented by the United States.

Government evidence on term taking

The first witness for the United States was Robert B. Watts, vice president and general counsel of the Convair Division, San Diego, of General Dynamics Corporation (R. 1423–1507). Since 1949, Mr. Watts has been the officer whose duty it was to negotiate for the acquisition and disposal of real estate (R. 1423–1424). There had been made for Mr. Watts a tabulation of military contracts by fiscal years from 1947 to 1953 which were performed by Convair at San Diego (R. 1424). This tabulation was introduced as Plain-

tiff's Exhibit J, which was received in evidence for the limited purpose of illustrating the witness' testimony (R. 1425, 1451). The exhibit showed the type of contract, cost plus fixed fee, fixed price, etc., the description, i.e., broad subject matter of the contract such as B–36 components. The exhibit showed whether Convair was prime or subcontractor, the purchase order number, the "go-ahead date", the date of the definitive contract, the contract number, and the fiscal years in which the contract was active (R. 1444–1451). Mr. Watts testified as to the number of military contracts which were active during each fiscal year, 1948 through 1953 (R. 1454–1455). The court struck the answer as to 1953 because the witness did not know how many were active before May 1 (R. 1455). Mr. Watts then described in chronological order the lease negotiations for use of space in Convair Plant #2, excluding Building 1. There were five leases in the pre-Korea category (R. 1456–1459). There was no manufacture of commercial planes at San Diego between August 1949 and March 1951 (R. 1458). A lease was made in May 1950 on the eve of the Korean War (R. 1459–1461). Other leases followed the outbreak of the Korean War (R. 1461–1470). In this testimony Mr. Watts related the military contracts which necessitated the various leases. At one point, Mr. Carlstrom refused to lease any more space to Convair because he wanted to develop multiple tenancies of his buildings, and if there came a time when Convair no longer needed the property he would get the whole thing back at one time (R. 1463–1464). Mr. Watts, needing the space for the military

contracts, told Mr. Carlstrom that he was prepared to have the property condemned by the Air Force if necessary (R. 1464). Mr. Carlstrom's terms involved increased rentals (R. 1464). Having advised the Air Force of the terms, Mr. Watts proceeded to accept, "because I had to. We had to have the space" (R. 1464). Mr. Watts gave the terms as revised and the history of Convair's contract for the F–102 fighter plane, and told about the termination of leases in April 1953 in preparation for the condemnation of Plant #2 (R. 1464–1472). The direct examination of Mr. Watts was concluded with a recital of the mechanics by which the United States reimbursed Convair for the rentals paid by Convair (R. 1473–1475).

On cross-examination, Mr. Watts was questioned on whether some of the Convair leases made in 1950 were for storage space instead of production area (R. 1475–1483). He was then examined on what commercial planes had been built by Convair during the period of these leases (R. 1484–1489). They had built the "240" commercial airliner in the period prior to August 1949 (R. 1487). In March 1951 they started work on a new commercial plane, the "340", and finished the first model about a year later. (*Id.*) During the year 1950 only about 5% of their total work was commercial, that "small percentage represented by any miscellaneous parts manufacture which was going on at that time" (R. 1488). There was further explanation on the cross-examination of how the Government reimbursed Convair for the rentals paid at Plant #2 (R. 1488–1495). All rentals paid were placed in an "overhead" account, and allocated on the basis of di-

rect labor dollars expended on the several contracts (R. 1490). Mr. Watts was also cross-examined on the amount of control which the Government exercised over Convair's operations (R. 1495–1501). While the Government before awarding a contract would make sure the contractor had adequate facilities, it did not specify that it must be performed in a particular building (R. 1500–1501).

On redirect, Mr. Watts testified that all but about 5% of the rents paid in 1950 by Convair were reimbursed by the Government. For all the years in this general area 1951, 1952, etc., 85% or more of the rentals paid were reimbursed by the Government (R. 1501–1503).

After Mr. Watts had finished, the court summarized for the jury what the contentions of the parties would be with respect to this testimony (R. 1503–1507). The court explained the position of the Government that the Convair leases were not free and open market transactions, and that the leases were based on the necessity of the Government for these particular facilities. On the other hand, the defendants would contend that Convair was an independent contractor, and that there was no direct agency between the activities of Convair and the Government.

C. W. Carlstrom was called by the Government under Rule 43(b) as a hostile witness. Mr. Carlstrom testified that he acquired the property here in question from War Assets Administration on May 4, 1948, for $1,050,000 (R. 1507). Mr. Carlstrom was also asked about the efforts he made to sell or lease the property, the gross yield he received from it, and

the statements that Mr. Carlstrom had made in 1951 when he petitioned to have tax assessments on this property reduced (R. 1508–1509).

The first real estate expert to testify for the Government on the term taking was John Cotton (R. 1509–1605). Mr. Cotton's qualifications are not printed (Tr. 3322–3331). Mr. Cotton testified on the things he did to acquaint himself with the property. He inspected the properties (R. 1511). He determined the nature of the estate taken. He interviewed Mr. Carlstrom. The contractor who originally constructed the plant was interviewed (R. 1512). The manner and extent of the taking of the access for Highway 101 were determined. Mr. Cotton secured information on the nature of the parking agreement on the baseball club property. He studied the neighborhood. He procured information on the original 92.8 acres which originally comprised Convair Plant No. 2 with its 2,441,236 square feet of building space, and information regarding the 735,000 square feet of building space that had been sold to the County (R. 1513). Mr. Cotton checked on the industrially zoned property, and the amount of property available at the date of valuation (R. 1514). He reviewed property and business trends in San Diego (R. 1514–1515). Mr. Cotton checked to see if there were any potential large space users in the area, and whether Rohr Aircraft Co., Solar Aircraft Co. or Ryan Aircraft Co. had any interest in acquiring space at the subject property prior to May 1, 1953 (R. 1516). He studied leases on other industrially zoned property (R. 1516–1517). Mr. Cotton agreed with Mr. Burlake as to the

structures present on the property and with Mr. Hallock as to their condition (R. 1518–1520).

Mr. Cotton continued with the factors he considered in formulating his opinion of highest and best use and fair market value (R. 1520–1581). Mr. Cotton considered the individual parcels in relation to each other and in relation to other property in the neighborhood (R. 1520–1521). Mr. Cotton explained the ingress and egress which each building had (R. 1522–1527). He contrasted the new industrial buildings being built in the area with these buildings (R. 1527–1529). The several ownerships of the subject parcels and the various leasehold occupancies were considered for the probability of unitization of the subject properties (R. 1529–1530). The highest and best use of the property individually and unitized was considered. Mr. Cotton considered the single purpose construction of the subject properties in their initial design when they had been part of a unitized auxiliary plant, and made comparisons with other single purpose properties occupied for other than their originally intended purpose (R. 1531). Mr. Cotton found the present property unique, especially in the three immense buildings which are not equaled in San Diego except in Convair Plant No. 1 (R. 1532). It was found that Plant #2 was located near San Diego Municipal Airport, yet large manufacturing plants producing aircraft have located not nearby an airport but upon an airfield (R. 1534). There was no way this plant could be integrated with use of space on an airfield except in connection with Convair Plant #1. During the time Mr. Carlstrom was

offering the plant for rent Rohr Aircraft, as to some portion of the buildings, considered it, but leased property elsewhere (R. 1535). Ryan Aircraft and Solar Aircraft knew of its availability but had no use for it. Convair itself had no need for the property for any commercial operation and its expanded use was necessitated only by its urgent needs in defense contracts. There was consequently no demand for this property as an integrated plant (R. 1535). This was on the theory of unity of ownership between Carlstrom, Assemblies and Salvation Army (R. 1536). But on investigation it was found that the conveyances between the parties as to easement plans appear to place the parties at arm's length positions.

Mr. Cotton considered the manner in which an owner-investor could utilize the property in leasing it for multiple occupancy of the kind and size more predominant in San Diego (R. 1538). Mr. Cotton then testified on the leases which he considered comparable, all of which are contained on Exhibit 25 (R. 1540–1564, 2160). Mr. Cotton also testified on certain leases he did not consider comparable (R. 1564–1567). There were introduced in evidence certain easement agreements concerning the utility services, sewer, water and storm lines, electrical conduit, steam pipe, gas pipe, etc., to be furnished to the individual parcels (R. 1567–1580). Mr. Carlstrom reserved the fee interest in the main lines, pipe, conduits, etc. (R. 1573). Mr. Carlstrom granted a nonexclusive right to use the railroad siding (R. 1574). Mr. Carlstrom also granted easements 25 feet in width from the building to the nearest public street (R. 1574). If at any time Mr.

Carlstrom should require, the grantee will immediately at its own expense sever all utility services facilities and install separate independent systems (R. 1575). While the agreement read in the record related to Building No. 2, those relating to Buildings 3 and 4 were generally the same (R. 1576, 1569). A similar agreement relating to Building 28 was also read (R. 1578–1580).

Mr. Cotton then gave his highest and best use for the property (R. 1581–1583). In his opinion this would be as follows:

> *Parcel 9A* (Buildings 1, 5, 7, 24 and 27)—industrial use, with emphasis upon multiple use for warehousing, mercantile distribution, light manufacturing, and possible limited commercial use of Pacific Highway frontage.
>
> *Parcel No. 5* (Building 4)—office space for occupancies not requiring proximity to the central business district.
>
> *Parcel No. 6* (Building 2)—industrial occupancy.
>
> *Parcel No. 7* (Buildings 3 and 3A)—industrial use with emphasis on warehousing, mercantile distribution, multiple occupancy for light manufacturing purposes.
>
> *Parcel X* (Building 28)—limited commercial or light industrial purposes.
>
> *Parcel 9B* (Vacant land)—light industrial use such as contractor's office and yard.
>
> *Parcel 9C* (railroad spur)—carloading purposes in connection with adjoining property.

The property would not have a higher or better use even if there was a reasonable probability of unitization (R. 1583). Mr. Cotton then gave his opinion of

fair market value for the 14-month term taking (R. 1586–1590). This information was summarized for the jury in Plaintiff's Exhibit R (R. 2191). It is also included in the appendix of appellants' brief. There was a subsequent correction as to the value of Parcel No. 6, Building 2, because after Mr. Cotton had testified the court ruled if Assemblies should be forced under the easement agreement to sever utility services they would have a way of necessity to bring in new services from the outside (R. 1646–1655).

Mr. Cotton then gave the reasons which prompted his determination of highest and best use and fair market value (R. 1590–1605). Parcel 9A enjoyed complete freedom of access to both sides of the inplant road, to the pedestrian overpass crossing Pacific Highway, to the outer highway and frontage road, to the ingress from the north from Rosecrans Street, and the ingress and egress from the south by way of the 55-foot easement to Washington Street subject only to the prospect of using some of that 55 feet for widening Pacific Highway (R. 1590–1591). Buildings 2, 3 and 4 had only limited access (R. 1591). Building 28 had good access. The parking rights were valuable for the pro rata portion of each parcel to park 3,000 cars for limited daytime periods (R. 1592). Another reason for his valuation is the central supply system of utilities other than electricity and the burdens upon the several parcels other than 9A, 9B and 9C (R. 1594). There was a leveling off in the spring of 1953 of the uptrend in San Diego's econ-

525540—59——4

omy which had followed the Korean War (R. 1594–1595). Mr. Cotton then discussed the individual parcels and the several buildings separately (R. 1595–1605). The cross-examination of Mr. Cotton is not printed (Tr. 3470–3556).

During the weekend recess after Friday, March 1, 1957, Mr. Burrill, of the firm of Hill, Farrer & Burrill, representing Salvation Army and Mr. Carlstrom, died. A recess was granted while defendants could arrange for substitution of counsel. Mr. Albert J. Day and Mr. John N. McLaurin replaced Mr. Burrill for Hill, Farrer & Burrill. In addition, the firm of Luce, Forward, Kunzel & Scripps, represented by James L. Focht, Jr., was associated on behalf of Mr. Carlstrom (Tr. 3347–3351). Court reopened without objection on March 21, 1957, and the court explained to the jury the substitution of counsel (Tr. 3369–3371).

The second real estate expert who testified for the Government on the term taking was Fred B. Mitchell. Mr. Mitchell's statement of his qualifications is not printed (Tr. 3557–3569). Nor are the following parts of his testimony: his acquaintance with the property; studies he made to prepare himself for making an appraisal (Tr. 3592–3609); and the comparable leases, which are included in Exhibit 25 (Tr. 3609–3627; R. 2160). Mr. Mitchell then recited the factors he considered in arriving at his opinions of highest and best use and fair market value (R. 1606–1616). These included the approaching end of the Korean War in April 1953, the limited parking rights, the attitude

of business toward buildings built at another time and for a specific purpose, the remoteness of finding an occupant who could utilize an entire building, and the cost of adjusting the buildings to the needs of users (R. 1606–1609). Mr. Mitchell discussed the attributes of specific buildings (R. 1608–1616). The highest and best uses for the several parcels were as follows:

Parcel 9A (Buildings 1, 5, 7, 24 and 27)—light industrial use, some commercial value including automobile parking (R. 1618).

Parcel 5 (Building 4)—light industrial use which would include offices (R. 1618).

Parcel 6 (Building 2)—light industrial or manufacturing use (R. 1618).

Parcel 7 (Building 3)—light industrial or manufacturing use (R. 1618).

Parcel X (Building 28)—commercial or light industrial (R. 1619).

Parcel 9B (vacant land)—light industrial use (R. 1619).

Parcel 9C (spur tracks)—railroad use (R. 1619).

The direct examination continued with the reasons for the highest and best use assigned to each parcel (R. 1619–1622). Among the reasons recited were the limited access these buildings had to a public street, the dimensions of the buildings, the multiple uses in relation to parking, and the fact that the buildings were designed at a different time for a specific need. The probability of unitization was then discussed. Mr. Mitchell did not think the separate parcels would have a higher use on a unitized basis because of the size

of an employer who could use the whole plant and the tendency toward modern type buildings designed for a specific purpose rather than adapting old buildings (R. 1621–1622). Mr. Mitchell concluded with his fair market value (R. 1622–1627). These were summarized for the jury on Plaintiff's Exhibit S (R. 2192). The values are also included in the appendix of appellants' brief. The cross and redirect examination of Mr. Mitchell is not printed (Tr. 3660–3797).

The district court instructed the jury that the petitions for reduction of tax assessments were only admissible against defendant Carlstrom and, in some instances, Assemblies of God. The court pointed out that the exhibits relating to the year 1948 and, to a lesser extent, 1951, might also be considered too remote. Also, when they speak of the assessed value, it is usually no more than 25% to 40% of actual value. The court had the clerk write on Exhibits N and O, "As to Carlstrom and Assemblies only" and on P and Q "admitted as to Carlstrom only" (R. 1629–1636). Certain portions of these petitions were read into the transcript but have not been printed (Tr. 3880–3929). Mr. Carlstrom was recalled under Rule 43(b) and testified that he made no substantial repairs to the property after he had signed Exhibit P, the petition relating to 1948 (Tr. 3929–3930).

The final real estate expert for the Government on the term taking was Roy C. Seeley (R. 1636–1646). Mr. Seeley's qualifications, the preparations he made, and the factors he considered, combined with the

reasons for his opinions, have not been printed here (Tr. 3933–3978). Mr. Seeley gave his opinion of the highest and best use of each parcel. This was commercial and light industrial (R. 1636–1637). Mr. Seeley then gave his opinion of fair market value for the term taking (R. 1638–1646). These values were summarized for the jury on Plaintiff's Exhibit U (R. 2193). They are also contained in the appendix of appellants' brief. The cross-examination of Mr. Seeley has been omitted from this record (Tr. 3994–4115).

The fee taking

In the fee taking, the property was divided into "tracts" rather than "parcels". This was merely a device for convenience to separate the term taking from the fee taking. Counsel were allowed to make separate opening statements for the fee taking. The first was by Mr. Janofsky representing Assemblies of God and Children's Aid Foundation (R. 1655–1677). This third phase of the case is to value the fee title as of June 16, 1955, in the condition in which the property was in May 1953 (R. 1656). In common parlance the fee title is the absolute ownership of the property (R. 1657). Mr. Janofsky then pointed out the tracts on Exhibit V, and explained the ownership of each, as follows (R. 1657–1666):

Owner	Tract	Building
Business Properties, Inc	A-100	8 (drop hammer building).
Salvation Army	A-101	1 (large manufacturing building).
Assemblies	A-102	2 (large manufacturing building), 3 and 3A (large manufacturing buildings), 4 (office building), 28 (cafeteria building).
Disputed between Assemblies, Salvation Army, and Convair.	A-106	(Vacant land).
Children's Aid Foundation	A-107	24 (office or security building).
Salvation Army	A-108	27 (cafeteria or woodworking building).
Carlstrom	A-109	7 (paint shop).
14/20 Assemblies	A-120	2 south watertanks.
6/20 Salvation Army	A-121	2 north watertanks and Building 5 (utility building).
Carlstrom	A-110 adjoins A-109	Railroad spur tracks.
Salvation Army	A-111 adjoins A-101	
Assemblies	A-112 to 118 adjoin A-102.	
Business properties	A-119 adjoins A-100	
Parking privileges appurtenant to above property.	B-201	Parking lot.

During the above recital with respect to tracts in divided ownership, the court explained again to the jury that they merely had to return the verdict for the parcels or tracts, and were not concerned with individual interests therein (R. 1661–1662). Mr. Janofsky gave the jury a detailed account of the transfers of property from Mr. Carlstrom to Assemblies of God, Salvation Army and Children's Aid Foundation subsequent to May 1, 1953 (R. 1667–1671). Mr. Janofsky mentioned that "the jury's first and the jury's only problem is to determine the market value of the fee title of each tract of land which is shown on Exhibit V * * *" (R. 1671). He explained what was meant by "highest and best use", "there is nothing mysterious about it." (*Id.*) It was contended that the evidence would show that the highest and best use would be for each tract to be used in combination with the other tracts (R. 1671–1672). Mr. Janofsky concluded with the contention of Assem-

blies on the values of their various tracts (R. 1675–1677).

The next opening statement was by Mr. McLaurin on behalf of Salvation Army (R. 1677–1685). Mr. McLaurin expected to show that Tract No. A–101 (Building #1) was transferred from Mr. Carlstrom to the Salvation Army in April 1954 for $750,000 and "That $2,000,000 was by way of a charitable gift * * *" (R. 1680). This statement was made over the objection of the United States. The witnesses presented by Mr. McLaurin would give the investigations they made, the factors they considered, and the reasons they have for forming an opinion of fair market value (R. 1682). Some of the reasons were then noted (R. 1683–1684). Finally, he stated the fair market value he expected to prove (R. 1685).

Mr. Focht gave a brief opening statement for Mr. Carlstrom (R. 1686–1689). Mr. Focht noted that Mr. Carlstrom had transferred the properties to "selective charities", some by sale, some by "outright gift" and "some apparently was a combination of the two", so that he retained only Building #7 (Tract A–109).

Mr. Horton opened for Business Properties, which owned Tract No. A–100, improved by the drop hammer building (R. 1689–1692). This tract is not in the appeal.

The opening statement for the United States was by Mr. McPherson (R. 1692–1704). Mr. McPherson touched upon the tracts being valued without regard to ownership, that the property was to be valued as of June 16, 1955, in the condition it was in on May 1, 1953, comparable sales, the limitations of the parking

agreement, the problems of access to the plant, the fact that there must be a demand for the property for the highest and best use as well as mere adaptability, and the fair market value which the Government expected to show from all the tracts.

Landowners' evidence on fee taking

On the fee taking, the first witness for the appellants was John N. Sayer (R. 1704–1821). Mr. Sayer recounted the things he did to prepare himself to testify, some of which have not been printed (Tr. 4309–4322). Mr. Sayer gave the leases made between May 1, 1953, and June 16, 1955, that he considered (R. 1704–1737). The testimony on these leases was preserved for the jury on Exhibit #33 (R. 1718–1722, 2167). In explaining Exhibit 33, and the other exhibits listing comparable sales and leases, the court interpolated that it had required the experts for the Government and the landowners to exchange lists. On the compilation of these lists, Exhibit 25 (leases) and 57 (sales), the fact that the Government did not know of a sale or lease is indicated by a blank in the Government's exhibit number. The fact that the landowners did not know of a sale is indicated by a parenthesis around the landowners' exhibit number. The court explained this was purely a matter of mechanics from which no inference was to be drawn (R. 1712–1722, 2160, 2168).

There were extended arguments out of the presence of the jury on various subjects. When the jury returned, the court made these announcements to them. Relating to access roads, there was a dispute as to the

ownership of and the right to use a piece of ground 23 feet by 80 feet in the extension of Washington Street. Undoubtedly the matter would be eventually cleared up, but for the present there is some uncertainty about it (R. 1745–1749). Next, on access from Rosecrans Street from the North, there was introduced in evidence Exhibit V–1, which illustrated the width of that street. It was 12 and a fraction feet at its narrowest point (R. 1749–1753). The court ruled that leases between Mr. Carlstrom and Convair after January 1, 1951, with one exception, were not to be considered as comparables by the jury. Exhibit 25 was to be altered to indicate the excluded leases. "It is not your business why the court rules, but the court ruled that they were not free and open market transactions because of the compulsion testified to by Mr. Watts and testified to by Mr. Carlstrom" (R. 1754). Finally the court instructed that on the interplant road, after it left the vehicular overpass and went down to Washington Street, an easement 90 feet wide had been given by the United States for roadway purposes during its former ownership of which 35 feet was added to Pacific Coast Highway, and the remaining 55 feet was given to the City of San Diego for roadway purposes (R. 1755–1756).

The examination of Mr. Sayer continued with sales he had considered in connection with the fee valuation (R. 1757–1793). Before he started on these sales, there was introduced in evidence Exhibit 57, the composite of both the Government's and the landowners' comparable sales, and it was explained to the jury

(R. 1757–1765). The court instructed the jury not to be perturbed because there was a gap in the exhibit numbers. Some of the exhibits were in evidence before the court only. Eventually the Clerk would make up a list of exhibits before the jury so they would have all they were supposed to (R. 1758). Mr. Sayer testified generally on the sales, and previously on the leases that he did not consider them comparable to subject property on a unitized basis.

The court announced to the jury that Parcel 9–C of the term taking and Tracts A–110, 111, 112, 113, 114, 115, 116, 117, 118 and 119 of the fee taking, all pertaining to the railroad spur tracks, had been settled and withdrawn from the consideration of the jury (R. 1793–1794).

Mr. Sayer continued with an explanation of his capitalization of income study (R. 1795–1798). He also made a "cost analysis" of the subject property, or a "depreciated reproduction cost estimate" (R. 1798–1803). Mr. Sayer gave his opinion of the highest and best use of the subject property as of June 16, 1955. This was for industrial use, including manufacturing, assembling or related activities (R. 1803). The opinions of fair market value followed (R. 1805–1811). This opinion testimony was summarized for the jury on Exhibit 58 (R. 2170). Mr. Sayer concluded his direct examination with the reasons for his opinions (R. 1811–1813). These were the cost of reproduction new less depreciation as of the date of taking, the plottage value of the lands, the parking facilities available for 81 months after the date of valuation, and the analysis of the three basic ap-

proaches to value. On cross-examination Mr. Sayer testified that he considered all three basic approaches to valuation. He thought depreciated replacement cost analysis the most proper approach, the income approach being more proper for office buildings, apartments, etc. (R. 1820–1821). Depreciated reproduction cost should be given much more consideration than any other factor in his opinion (R. 1821). For the most part, the cross and redirect examination of Mr. Sayer has not been printed (Tr. 4721–4802). His opinions of fair market value on a segregated basis appear on Exhibit 59, however (R. 2171).

The next real estate expert for the appellants was Ewart Goodwin (R. 1822–1848). The testimony of Mr. Goodwin on his additional qualifications, the general recital of studies he had made to prepare himself, lists of specific sales of vacant lands,[8] and his opinion that sales of improved properties were not comparable have been omitted from the printed record (Tr. 4856–4894). Mr. Goodwin then turned to the reasons for the values he ascribed to the subject property. He discussed the economic picture in San Diego in 1955 (R. 1822–1824). He found that 500,000 square feet of warehouse and manufacturing had been built or was planned in 1953, 1954 and 1955 (R. 1824). A well-informed person would be interested in the subject property because of its ideal location, because of what it would cost to build a similar facility elsewhere and because of the advantages of San Diego (R. 1825). Within San Diego, the plant locale had very good highway connections to all parts of

[8] These sales are included in Exhibit 57, R. 2168.

the area (R. 1826–1827). The access to the plant itself from the neighboring streets and railroad was better than other industrial properties (R. 1827–1830). In forming his opinion of fair market value, the size of the buildings, the zoning of the property, original purpose of the buildings and their age were considered (R. 1830). There was "an evident demand for industrial property in San Diego" (R. 1831). It was generally known that there was a shortage of land for property that was zoned or improved for industry. Mr. Goodwin cited examples of expansion by other aircraft plants around the nation (R. 1831–1832). He noted the difficulty because of the Dispersal Program of getting a certificate of necessity for tax purposes to build new plants within 300 miles of the Pacific (R. 1833–1834). Mr. Goodwin discussed the reproduction cost new less depreciation, and concluded that any well-informed person would be very interested in a property he could buy for its reproduction cost less a fair depreciation (R. 1834–1838). Mr. Goodwin considered various factors relative to the reasonable probability of unitization (R. 1838–1839). The highest and best use of the property in his opinion was industrial and manufacturing, including the manufacture of small aircraft, aircraft parts, pleasure boat and other uses that might involve metal work (R. 1840). Mr. Goodwin then gave his opinion of fair market value (R. 1840–1848). This was summarized for the jury in Exhibit 60 (R. 2172). These values are also included in the summary in appellants' brief. Mr. Goodwin's testimony on cross and redirect exam-

ination has not been included in the printed record (Tr. 4926–5008). The testimony on the fair market value of the subject property on a non-unitized basis is summarized in Exhibit 61 (R. 2173).

The third real estate expert for the appellants was David F. Culver (R. 1849–1868). The studies he made, following the same general pattern as the other witnesses, has been omitted (Tr. 5009–5023). Mr. Culver gave his opinion on highest and best use: industrial, large assembly or subassembly of parts, heavy manufacturing (R. 1849). He then gave his opinion of fair market value on a unitized basis (R. 1850–1857). This was preserved for the jury on Exhibit 63 (R. 2175). Mr. Culver next gave the reasons for his opinion of fair market value. He considered the factors relating to unitization, that the tracts were tied together by common utility systems, that the owners held the buildings for investment purposes and that Salvation Army and Assemblies of God owned about 90% of the total area (R. 1858). The location was excellent, being on Highway 101. The property had unique plottage qualities. Nothing of the same size was available in the vicinity. The buildings were adaptable for the uses he ascribed (R. 1859). The trackage was important. It had unusual access from Rosecrans Street, Washington Boulevard and Highway 101. The parking rights were important (R. 1860–1862). Mr. Culver did not consider any of the sales directly comparable (R. 1862–1864). He found that improved industrial properties in the San Diego area had been selling at or above the depreciated replacement cost (R. 1865–1866). On cross examina-

tion, Mr. Culver stated that he used neither the reproduction, capitalization nor comparable sales method directly to determine fair market value, but he used them to check his opinions (R. 1867–1869). Most of the cross-examination has not been included in the printed record (Tr. 5048–5060). His testimony on the fee value on a segregated basis was summarized for the jury in Exhibit 64 (R. 2176).

The final witness for the appellants was Charles B. Shattuck (R. 1869–1881, 1889–1907, 1922–1925). Mr. Shattuck initially gave his opinion of fair market value (R. 1869–1876). These figures are contained on Exhibit 65 (R. 2177). They are also included in the summary appearing in the appendix of appellants' brief. Mr. Shattuck then continued with the general line of testimony, the factors he considered, the reasons for his opinion, etc., as the previous experts. Most of direct, the cross and redirect have not been printed (Tr. 5105–5152, 5272–5366). There was one respect in which Mr. Shattuck's testimony differed from the others. Following the appellants' general line, Mr. Shattuck had testified why the sales on Exhibit 57 and leases on Exhibit 25 were considered non-comparable and inconclusive of fair market value (R. 1876–1879). He then explained how the summation method, or reproduction new less depreciation, was used in determining fair market value (1879–1881). A bit later, there was introduced a series of exhibits entitled "A Capital Value Estimate, Stabilized Income and Expense". One exhibit was made for all tracts as a unit and for each tract individually (R. 2179–2188). Mr. Shattuck explained these exhibits item by item (R. 1889–

1901). One of these items was a reserve for repair and maintenance. "* * * I estimate that the reserve or expense in that regard is going to be equivalent to the building cost new multiplied by .0056. That's fifty-six hundredths of one percent of the cost new of the building annually, set aside for repair and maintenance, which amounts to $86,250 a year" (R. 1893–1894). Mr. Shattuck concluded this discussion with a check of the capitalization rates which he used against those prevalent in the sales and leases appearing on Exhibits 25, 33 and 57 (R. 1901–1905). The "final upshot of all this" was that the reproduction costs approach will be given greater weight in appraisals of industrial property with the income approach next and the comparable sales approach being "of no help in the absence of strictly comparable property * * *" (R. 1906–1907).

On the basis of this testimony, the United States moved for a mistrial (R. 1907–1917). The testimony was violative of the court's order that the reproduction cost of the building could not be introduced in evidence. All the jury would have to do to calculate this witness' estimate of reproduction cost new would be to divide .0056 into $86,250. The motion for mistrial was denied (R. 1913). The court did, however, instruct the jury that it was to disregard any reference to the percentage figure (R. 1917–1922). The court instructed the jury that reproduction new less depreciation was not fair market value, although the experts could use that method as a check against their opinion of fair market value. The fee valuation testimony on a segregated basis given by Mr. Shattuck on

cross-examination is summarized in Exhibit 100 (Tr. 5302–5305, R. 2189).

Earlier, during Mr. Shattuck's direct testimony, the court instructed the jury that it was to disregard certain leases between Mr. Carlstrom and Convair insofar as the amount of rentals paid for those leases was concerned (R. 1881–1883). The jury was given a new Exhibit 25–S (for substituted) which eliminated from the old Exhibit 25 all those leases which the court had stricken (R. 1887). The stricken leases could be considered by the jury, however, insofar as the area of such leases and the terms (as to time) of the leases affected the possibility of the property being unitized (R. 1883–1886).

At this point of the trial the jury was allowed, over the objection of the Government because of changes in the property and its use, to visit the plant in the company of the court and counsel for both parties. An account of what transpired is printed in the record (R. 1925–1936).

The next witness was Mr. Bruce Stallard, who testified as a real estate expert for the defendant Business Properties, Inc., former owner of Tract A–100, the drop hammer building (R. 1937–1943). Mr. Stallard gave his opinion of the highest and best use on a unitized basis as part of Plant No. 2, his fair market value and reasons. The opinion of value was preserved for the jury on Exhibit 103, which has not been printed because no appeal has been taken by Business Properties, Inc. (R. 1939). Value testimony has been summarized in the appellants' brief on Tract A–100.

The court allowed the jury to consider the original sale of the plant from War Assets to Mr. Carlstrom, and the sale of Building 8 by Mr. Carlstrom in 1947 and 1948 (R. 1943–1944). These sales were added to the list of sales as Exhibit 57–1 (R. 2169). The court cautioned the jury on the effect that the element of time had on comparability at the time this exhibit was introduced.

Government's case—fee taking

The first real estate expert for the Government on the fee taking was John Cotton (R. 1944–2011). On direct examination Mr. Cotton gave the steps he took in making his determination of highest and best use and fair market value of the tracts. Generally, he ascertained the ownership, found the ingress and egress available to the tracts, and rechecked the economic data for San Diego (R. 1944–1947). Mr. Cotton discussed the leases appearing on Exhibit 33 (R. 1949–1955). He discussed the sales appearing on Exhibits 57 and 57–1 (R. 1955–1976). The comparability of the various sales and leases to the subject property was pointed out in this discussion. Mr. Cotton also made a market trend analysis of properties which had been sold more than once between 1946 and 1955. This was to determine the trend and the market increase between the first and later sales. These sales and resales were discussed individually (R. 1977–1994). This information was summarized for the jury on Exhibit AM (R. 2194). Mr. Cotton also made a study of the value of the equipment in Building 5, the utility building, Parcel A–121 (R.

1995). His opinion of fair market value of each tract followed (R. 1996–1999). This information was summarized for the jury on Exhibit AN, and appears in the resume in appellants' brief (R. 2195). Mr. Cotton next gave his reasons and factors combined for his values. He considered the separate ownership of the several parcels (R. 2000–2002). He found a resistance in the market to the subject properties (R. 2005–2006). The size of plants in the San Diego area was analyzed, the use of single purpose properties for purposes other than their original use, the reasonable probability of unitization of the subject tracts, and the temporary nature of the parking rights were also considered (R. 2006–2008). Mr. Cotton gave his opinion of highest and best use, which was generally warehousing and light manufacturing (R. 2008–2010). The cross-examination has not been printed, nor has the redirect or recross (Tr. 5658–5820).

The next expert for the Government was Fred B. Mitchell (R. 2011–2034). The studies Mr. Mitchell made preparatory to making his appraisals have been omitted from the printed record (Tr. 5821–5852). Mr. Mitchell expressed the opinion that most of the tracts would have a highest and best use for light industrial uses, storage or warehousing and some would have commercial value (R. 2011–2015). The opinion of fair market value followed. The recapitulation of this testimony was presented to the jury on Exhibit AY (R. 2196). It is also included in the summary in appellants' brief.

The direct examination was concluded with the combined reasons and factors for Mr. Mitchell's opinion. His conclusions were predicated on the economic conditions on the date of appraisal, the types of the buildings, their relation to each other, the ownership of the various tracts, the trend toward larger parcels of land with excess land for expansion, the lack of a market for a large but incomplete plant of this size by a single user, the average size of businesses in San Diego, the supply and demand element, the single purpose construction of the subject property, the nature of buildings that had been constructed in the neighborhood recently, and economic conditions in San Diego (R. 2018–2128). Mr. Mitchell concluded with an explanation of how he found the comparable leases and sales helpful (R. 2028–2031). Most of the cross and redirect examination of Mr. Mitchell has not been printed (Tr. 5875–6027).

The final real estate expert for the Government was Roy C. Seeley (R. 2034–2050). The steps he took to prepare himself have not been printed (Tr. 6030–6034). Mr. Seeley then expressed the principal factors and reasons for his opinions. These included the effect of the end of the Korean War, sales of industrial property in San Diego since 1948, the traffic situation relative to the subject property, and the supply and demand for industrial property in the San Diego area (R. 2034–2037). Mr. Seeley was unable to find that any demand for the subject properties existed (R. 2037). There was a possibility that the interplant road which went over the vehicular overpass and south to Washington Street could be reduced

in width from 55 to 15 feet by the City of San Diego (R. 2038). The parking agreement was for a limited term (R. 2038–2039). There had been a preference shown in the San Diego area for other properties rather than the subject tracts (R. 2039). The buildings were in need of rehabilitation. The size, shape and type of construction of the nine buildings which were specially located and designed for a special purpose and their interrelation were considered. The limited access to the tracts from Rosecrans and to Washington Street was considered. Mr. Seeley considered the purchase price of the entire area of $1,050,000 and the purchase price of $108,900 paid for Tract A–100 in 1948 (R. 2041). The unsuccessful efforts of Mr. Carlstrom to sell or lease portions of the plant were considered. The parking space in relation to the size of the buildings was inadequate and poorly located. The industrial dispersal plan was still in effect (R. 2041–2042). Mr. Seeley, after giving the assumptions on which he based highest and best use and fair market value, stated the highest and best use for each tract. This he found to be commercial or light industrial uses (R. 2042–2045). Mr. Seeley concluded his testimony on direct examination with fair market value for each tract (R. 2046–2048). This testimony was preserved for the jury on Exhibit BA, and is in the summary in the appendix of appellants' brief (R. 2197). The cross-examination of Mr. Seeley has been omitted from the printed record (Tr. 6352–6429).

The only witness on rebuttal was Mr. Howard Turrentine, an attorney for the lessee of Building 8, the drop hammer building (Tr. 6458–6465). This is not

included in the printed record as it was merely to show that there had been negotiations by Convair in 1951 and 1952 to obtain a lease on that building from the lessee and lessor.

Closing arguments to the jury were given by Mr. Janofsky for Assemblies of God and Children's Aid Foundation (Tr. 6728–6790), by Mr. Focht for Mr. Carlstrom (Tr. 6799–6811, 6846–6865), by Mr. McLaurin for Salvation Army and Mr. Carlstrom (Tr. 6867–6902, 6909–6933), by Mr. Horton for Business Properties, Inc. (Tr. 6933–6956), by Mr. Minton for the Government (Tr. 6993–7057), and by Mr. McPherson for the Government (Tr. 7057–7109, 7117–7139). Replies to the Government's closing argument were made by Mr. McLaurin (Tr. 7140–7167), Mr. Focht (Tr. 7167–7180, 7184–7196), Mr. Horton (Tr. 7196–7203) and Mr. Janofsky (Tr. 7203–7244). These arguments have been omitted from the printed record.

Instructions of the court

Following closing argument the court took some two hours and twenty minutes to read a comprehensive charge to the jury (R. 2050–2131). Without attempting to paraphrase completely the court's charge, a summary is given of the main points. The court determines the law and the jury the facts (R. 2051). The instructions must be considered as a whole. The jury is to determine, as to the applicable parcels of the term and option taking shown on Exihibit A and the applicable tracts in the fee taking shown on Exhibit V, the fair market value as of the date of taking (R. 2051–2052). The United States, profit and

nonprofit corporations are each entitled to the same fair trial (R. 2052). The court discussed inferences and presumptions (R. 2053). Statements and arguments of counsel are not evidence unless made as an admission or stipulation (R. 2054–2055). The court instructed what the evidence consisted of (R. 2055). Credibility, inconsistencies and contradictory evidence are discussed (R. 2055–2057). The view of the premises is evidence, although the activities there could not be considered and the condition of the buildings would be established from the other evidence in the case as of May 1, 1953 (R. 2057). The testimony of a single witness is sufficient to establish the proof of a fact if he is believed even though a number of other witnesses have testified to the contrary (R. 2057–2058). The exhibits reflecting the testimony of various experts are not direct evidence, but only summaries of the testimony heard, and are to be used only for refreshing the jury's recollection (R. 2058–2059). An expert witness' opinion is worth no more than the reasons upon which it is based. Value of expert opinion is then discussed (R. 2059–2060). In determining the market and rental values, the jury is not bound to accept the opinion of any witness but must determine such fact for itself. Burden of proof, preponderance of the evidence and quotient verdicts are discussed (R. 2060–2062). The United States has the right to take property, but such right is subject to payment of just compensation (R. 2062–2064). The court defined fair market value for the term taking, for the option to renew, and the fee taking (R. 2064–2068). All factors shown to affect fair market value

must be considered. However, factors that depend on events or combinations of events which, while within the realm of possibility, are not reasonably probable should be excluded (R. 2068). The jury was instructed on the nature of the estate taken by the term taking and the option (R. 2068–2069). The court specified the issues of fact to be determined by the jury (R. 2070–2072). The court has ruled that Parcel 5, containing Building 4, an office building, has easements of necessity to the inplant road, the pedestrian overpass, and to the service and frontage road. There are no easements of necessity affecting Parcels 6 and 7, Buildings 2 and 3, and ingress and egress is by means of 25-foot strips shown in Exhibit A. If the owners of the buildings affected by the Easement Plans and Agreements, Exhibits 6–M, 6–O, 6–Q and 6–S, were required to sever the service facilities for Parcels 6 and 7, there would be an easement of necessity to reinstall and connect service facilities. This instruction was illustrated by the court on Exhibit A (R. 2072–2074).

The right of the plaintiff to extend the term taken from year to year until 1958 at the same rental rate is a property right in the nature of an option which must be separately evaluated (R. 2074). There is no burden on the landowners to show a particular person or corporation ready, willing and able to purchase or lease the property (R. 2075). Nor, on the other hand, does the fact that the property was available and adaptable for various uses on the dates of taking mean that there was a market or prospective market on such dates (R. 2075). Population increases, busi-

ness activity, prospects of new markets shown by growth of the community and trends in the real estate market are all elements to be generally taken into account in determining value (R. 2075–2076).

Fair market value was defined and discussed for the jury (R. 2076–2077). In arriving at fair market value, neither the necessity of the United States to have these properties nor the wants and desires of the landowners are material (R. 2078). Fair market value is to be determined by considering any and all uses to which the property is adaptable, including highest and best use. The highest and best uses are those which the credible evidence shows were probable in the reasonably near future (R. 2078–2079). If any of the witnesses have based their opinions upon assumed or potential uses not shown to be reasonably probable, their testimony should be disregarded (R. 2079). Uses made of the property after the date of taking cannot be considered (R. 2079–2080). The necessities of the plaintiff for the property are not to be considered. However, this does not mean that the jury should exclude a similar use, including uses made of the property before May 1, 1953, if the jury believed that private individuals or corporations would also desire to purchase or lease the property for similar purposes (R. 2080). If because of government activity in and around San Diego, represented by the Navy base, the air station and private plants doing government work, there has been a general increase in rental and fee values throughout the area, then and to that extent the verdict may reflect the general market thus created and the Government may not complain.

But the need of the Government, if such the jury finds, for the property for military purposes after May 1, 1953, or enhancement in the value of the property by such need, will not be considered (R. 2081).

Value to the defendants for speculative or merely possible uses is not to be considered, nor what the property may be worth to the plaintiff. The court discussed "reasonable time" for making a rental or sale of the property (R. 2081–2082). In determining value, the same considerations are to be regarded as in a transaction between private parties (R. 2082). The willing buyer or user does not have to be a resident of this community. He might come from anywhere or have business activities anywhere. What the law demands is that the property be appraised on the basis of the market in the community in which it is located (R. 2083–2084). Fair market value does not mean what the property would bring under forced, distressed or duressed circumstances (R. 2084).

Market value must be for the land and improvements as a whole (R. 2084–2085). The court pointed out easements appurtenant to the various parcels and tracts, and instructed that the jury should include as part of the value any value which pertains to the right to use these appurtenant easements (R. 2085–2086). The court instructed how the petitions filed before the Board of Equalization were to be used (R. 2086–2088). A tag was placed on each exhibit filed in connection with these petitions to refresh the jury's recollection as to the limited consideration that may be given them (R. 2087).

The parcel and tracts containing the railroad spur tracks have been removed from the jury's consideration. But in arriving at the value of the remaining parcels and tracts which had the railroad spur available to them, they are to be valued just as though the railroad spur had not been removed from the jury's consideration (R. 2088).

The weight to be given the sales to Carlstrom and Gregory Electric in 1947 and 1948 is solely for the jury to determine (R. 2089). The leases of the subject property were discussed (R. 2089–2090). The weight to be given the leases remaining in evidence is for the jury's sole consideration. The parking rights must be considered in evaluating the various parcels and tracts (R. 2090–2092). Assessed value of the property for tax purposes must not be regarded as market value (R. 2093).

Bona fide sales and leases of comparable properties, if such are found, made within a reasonable time before the date of valuation, are the highest and best evidence of market value (R. 2093–2096). Comparability is a question of fact for the jury. If there are no comparable sales and leases, market value must be estimated (R. 2096). The determination is to be made in the light of all facts affecting market value. The witnesses have referred to three basic approaches to value, capitalization of income, reproduction cost new less depreciation of the improvements with land value, and comparable sales (R. 2097). In weighing the validity of their opinions, the jury may consider the weight given by them to each of these approaches in the light of all the facts in the case, and give to each

approach the weight to which the jury felt it was entitled (R. 2097). Reproduction cost new, less depreciation, plus value of the land, is not fair market value, but may be considered by an expert witness in forming his ultimate opinion as a check (R. 2098). Capitalization of income is a proper approach to market value, although it is not the sole approach.

The court then instructed on unitization (R. 2098–2104). The issue is whether unitization is reasonably probable (R. 2098). The contentions of the parties are outlined (R. 2098–2099). If the jury finds there is a reasonable probability of unitization, that should be considered not only for any bearing on highest and best use but also for its bearing on fair market value (R. 2100). The jury must differentiate between the reasonable probability of unitization on the leasehold and the fee (R. 2100–2101). The possibility of unitization must be enough to affect market value (R. 2102). The fact that one having the power of eminent domain may unite the property must be excluded. Whether there is a reasonable probability of unitization is not to be affected by the fact that the verdict is to be returned by parcels. The fact that the railroad spur has been removed from the jury's consideration does not remove it on the question of unitization (R. 2103). The mere fact that the attorneys for landowners have or have not cooperated in presenting evidence does not affect the question of unitization (R. 2103).

The relationship of the owners, the purposes for which they held the property, the character of the property, its availability and adaptability, and avail-

ability of other similar property could be considered (R. 2103–2104). The jury must not add anything to the award because the property was taken some time ago, nor must the amount the Government deposited or the landowners withdrew affect the verdict (R. 2104–2106). Court costs, attorneys' fees, and related costs are not to be considered by the jury (R. 2106–2107).

The court cautioned against chance methods of arriving at a verdict (R. 2107–2108). In admitting evidence to which an objection has been made the court does not pass on the credibility of such evidence (R. 2108). Conjecture must not be made about excluded evidence. The jury may disregard comments by the judge on the evidence in the case (R. 2109). The same is true of questions the judge asks a witness (R. 2110). The court told the jury how it should approach its deliberations, not to start out with emphatic opinions, etc. (R. 2110–2112). The court concluded with an explanation of the form of the verdict (R. 2112–2116).

The jury was advised it could submit questions in writing if it desired any additional information (R. 2122). The jury retired on May 13, 1957. In answer to an inquiry on the factors to be considered in unitization the court on May 14, 1957, gave further instructions (R. 2124–2131). On May 24, 1957, the jury requested to have the court's instructions repeated, and this was done (Tr. 7392–7465). Only portions of the repeated instructions are printed (R. 2133–2137). On May 27, 1957, the jury returned its verdict as appears at pages 2141–2142 of the

record. The answers of the jury to the special interrogatories were read into the record also (R. 2138–2140).

Phases of the case heard out of the presence of the jury

To acquaint this Court in a purely topical form with the portions of the trial of this case with which the jury was not concerned, the following portions of the transcript are noted: The process of selecting the jury is reported (Tr. 30–306). The issue of title to the railroad spur, Parcel 9–C and Tracts A–110 to A–119, was tried to the court without the jury (Tr. 313–545). Further chambers discussions of the railroad spur are found at pages 636–643, 654–660, 720–741, 4269–4292, and 4704–4710 of the transcript. The admissibility and use of evidence of reproduction cost new less depreciation were argued at length (Tr. 1380–1384, 1655–1719, 1729–1754, 1903–1904, 4804–4847). The effect of the various easements to and from the individual buildings, and whether grantees of Mr. Carlstrom were entitled to easements of necessity, were at issue in chambers (Tr. 1754–1903, 2475–2483, 3377–3382, 3841–3880, 4053–4084). What constituted comparable sales, especially the "part sale-part gift" transactions between Mr. Carlstrom and the charitable organizations, was debated extensively before the court alone (Tr. 1994–2013, 4206–4247, 4367–4375, 4426–4538, 4573–4577, 4610–4619, 5538–5546, 5586–5602). The admissibility of the Carlstrom-Convair leases was debated, whether they were free and open market transactions (Tr. 2150–2269, 3115–3125). There was argument about the admissibility of ap-

praisals made by the experts on other occasions as a challenge to credibility (Tr. 3752–3762, 3772–3780, 6331–6351, 6429–6455, 6573–6584, 6629–6654, 6670–6722). Whether the jury should view the premises was argued out of its presence (Tr. 4170–4191). The legal issues concerning access to the plant from the surrounding streets were discussed without the jury (Tr. 4377–4423, 4538–4573, 4577–4609). Lastly, considerable portions of this transcript are devoted to argument about instructions (Tr. 5212–5250, 5399–5409, 5741–5788, 6057–6327, 6472–6522, 6535–6573, 6584–6589, 7247–7259).

SUMMARY OF ARGUMENT

I

THE CONSOLIDATION OF THE TERM AND FEE PHASES OF THIS CASE FOR A SINGLE TRIAL WAS A PROPER EXERCISE OF DISCRETION BY THE TRIAL COURT

This case involves the taking of 10 industrial type buildings, surrounding lands and supporting facilities which had been built as part of a single industrial plant. One of the main contentions of appellants was that the property should be valued as one unitized plant. Had each tract or parcel containing isolated buildings been tried separately it would not have been fair to the landowners, nor would splitting the term from the fee taking have been fair to the United States. In neither case would the jury have received the whole picture.

There is no dispute as to the applicable law. The trial judge has broad discretion as to the method which will accomplish the best result, and the appel-

late court will not substitute its judgment merely because that seems a better choice. The handling of the case by the district court, far from being an abuse of discretion, showed great competence, skill and ability. The jury received expert guidance, and had practically all the determinative factors summarized on exhibits which it had before it in the jury room. Also, the jury stayed out long enough to allow it to consider properly all the evidence.

The fact that the award for one tiny tract of vacant land was higher than any expert opinion is insignificant. According to appellants' own witness this tract was only $\frac{1}{10}$th of one percent of the total value involved. Other than this one minor matter, the jury had a perfect record for all the awards and interrogatories.

Comparisons of this case to *Gwathmey* v. *United States,* 215 F. 2d 148 (C.A. 5, 1954), on the basis of number of pages of transcript, number of days' trial and pre-trial, total dollars involved, etc., are superficial. The *Gwathmey* case is readily distinguishable because there were 238 separate tracts which had no relation to each other, for the most part, whether of ownership or use. Further, the court in *Gwathmey* indicated as many as 50 parcels could be tried fairly in one proceeding. There was also a serious lack of due process because counsel was not given a fair opportunity to cross-examine. Appellants do not claim any violation of due process on cross-examination here.

In final analysis, appellants' argument that the case was too complex is based simply on length of the

record. As the rather full summary of the case presented to the jury in our statement shows, the case was presented to the jury in an easily comprehensible manner. Most of the length is accounted for by pure repetition and extensive hearings without the jury.

Appellants would require a new trial to divide the case into two parts, but fail to show how this would simplify it any further for the separate juries. There is no warrant for imposing a procedure so wasteful of the court's and jury's time.

II

THE COURT WAS CORRECT IN ITS MISCELLANEOUS RULINGS ON EVIDENCE OF WHICH APPELLANTS COMPLAIN

A. Evidence of the cost of rehabilitating the property for its highest and best use is a properly admissible factor to be considered by the jury. Mr. Hallock testified for the Government on the condition of the property as of the date of possession. In enumerating the repairs required, Mr. Hallock used photographs to illustrate specific defects. The jury was adequately instructed as to the nature of the photographs, and what they represented, and authenticity was not denied. Under the circumstances, there is no doubt that photographs are admissible. Whether a particular photograph will be admitted lies within the discretion of the trial judge.

The amount that it would be necessary to expend to make a property usable for its highest and best use is something that an intelligent buyer would be vitally concerned with, and is admissible. *Kinter* v. *United*

States, 156 F. 2d 5 (C.A. 3, 1946), is not germane, because the court there excluded cost of past repairs made on the property over the years, not the current cost of rehabilitation.

B. The district court ruled correctly and within the scope of its judicial discretion by eliminating from the cross-examination of Mr. Hallock repetitious and remote questions that threatened to prolong the trial greatly. The specific ruling complained of excluded further questioning on whether any repairs had been done on the sewer system between the date of valuation and time of the trial. The purpose was to test the credibility of Hallock's opinion that certain repairs were necessary. The question of whether these repairs were necessary had already been dealt with at length, and the substance of Hallock's answer was that "* * * maintenance can be deferred and deferred and deferred until a building falls down, if you want to." The line of questioning came after Mr. Hallock had been cross-examined for a full day and a half wherein rehabilitation had been covered extensively.

When dealing with evidence, such as condition of the property, relating directly to value, the district court had wide discretion. It was certainly no abuse of that discretion to limit remote and repetitious cross-examination. There are a few instances where facts occurring after the date of taking may be shown to prove or disprove the accuracy of an opinion formed at the date of taking. Had appellants merely wanted to know whether a subsequent inspection verified Mr. Hallock's opinion that repairs were neces-

sary, it might have been admissible, but a general recital of all repairs made subsequent to the date of taking is far beyond any of the decided cases. The ruling of the trial court is in accord with the general rule that valuation of land in a condemnation proceeding must be determined as of the time of taking.

C. Reproduction costs are not a reliable guide to fair market value and were properly rejected as direct evidence in this case where other evidence of a more trustworthy nature was available. The district court ruled that it would allow the experts to state, in general terms, that one of the factors they took into account in arriving at their opinions of fair market value was reproduction cost less depreciation. But the court would not allow the experts to go into an itemized accounting of the reproduction cost.

The measure of just compensation in a condemnation case is fair market value, and the best evidence of fair market value is comparable sales. In real property there are rarely enough transactions involving identical property to give an indisputable market price such as exists for fungibles. But this simply calls for weighing the incomparable elements of similar sales with the comparable elements and the basic objective remains the same.

There were over 50 recent sales of commercial and industrial property in the vicinity of Convair Plant #2, although, admittedly, few of them were as large in size. The jury also had before it the testimony of the experts on capitalization of income and their opinions of fair market value. In these circumstances it was not error to exclude an extended discussion on

the collateral issue of the cost of reproducing the buildings. Such evidence tends to confuse and mislead the jury and divert the attention from the actual value, i.e., what a willing buyer would pay a willing seller on the date of taking.

Reproduction cost has been almost universally discussed for its infirmities and unreliability as a guide to market value. Even those courts which allow evidence of reproduction cost have been careful to limit the circumstances in which it can be used and the purposes of its use. By contrast none of the cases relying on comparable sales feel it necessary to explain why other approaches to value are not used, or carefully limit its scope.

Reproduction cost is also unreliable as a guide to market value because, when used as the appellants wanted to use it, it amounts to an appraisal of the buildings separate from the land.

D. Government needs for a particular type of property cannot be considered in determining just compensation. To be clearly understood the introduction and subsequent striking of Convair leases must be viewed in correct time sequence. The district court initially ruled that leases between Convair and Mr. Carlstrom could be referred to just as any other comparable leases. These were discussed by appellants' experts. The court instructed that these leases could be considered to the extent they reflect a general increase in San Diego rental prices, but any increment due to the necessity of the Government for this particular facility could not be considered. At the outset of the Government's case on the term taking, it pre-

sented Mr. Watts, a vice president and general counsel of Convair, showing the necessity of Convair for this facility due to its contracts for military aircraft, and the reluctance of Mr. Carlstrom to make any leases to them. On motion of the United States the court withdrew the leases in question from the jury's consideration. At the request of appellants, however, the court modified its position to leave in evidence the terms of the leases as to area, location, etc., because of the unitization question. The appellants cannot complain, therefore, if parts of these leases remained in evidence. As for the Watts testimony on aircraft manufacturing contracts, that was presented as part of the rebuttal to appellants' contentions that the Convair leases were fair market transactions. Such rebuttal was of no weight when the court rejected the lease prices, and would probably have been removed had appellants' motion been made *after the Convair lease prices had been stricken.*

In striking the lease prices the court was following the mandate of the Supreme Court in *United States* v. *Cors,* 337 U.S. 325, 333–334 (1949), where it was held the Government cannot be required to pay an enhanced price for a type of property which its demand alone has created. This follows the general rule that the jury cannot consider the Government's needs for a specific property. Special value to the condemnor has long been excluded as an element of market value. The amounts paid by a condemnor for the same or other property are not even evidence of market value.

It is also clear from the testimony that, regardless of its formal legal relationship, the United States was in fact paying almost all the rentals. Under these conditions the courts treat the government contractor as the agent of the United States to see that substantial justice is done.

E. The district court was correct in ruling that the previous sale of the same property and Carlstrom's admissions against interest in a tax proceeding were admissible and in excluding evidence of fair market rental value 14 months after the date of taking. The courts have frequently held prior sales of the same property admissible, and whether such sale is too remote is a matter within the discretion of the trial judge. The district court was equally correct in admitting petitions which Carlstrom made in an effort to have his tax assessments lowered. While an actual assessment made by a public officer is not admissible, a tax return or statement of value made by the owner is admissible as an admission against interest.

Finally, the dstrict court was correct to reject proffered evidence of the value of the term taking 14 months after the date of taking. The United States when it took the first 14-month term took an option to renew. Obviously, this was an option to renew at the same price; otherwise there was no purpose in taking an option. The United States had the power to condemn all the additional terms it wanted without paying for the option.

ARGUMENT

I

THE CONSOLIDATION OF THE TERM AND FEE PHASES OF THIS CASE FOR A SINGLE TRIAL WAS A PROPER EXERCISE OF DISCRETION BY THE TRIAL COURT

The trial court had before it in this case a taking of 10 industrial type buildings with surrounding lands and supporting facilities. These buildings were part of a plant that had been built to operate as a unit. Indeed, appellants contended vigorously at the trial that the highest and best use of the buildings and facilities was on a unitized basis, and that they should be valued on that theory. It is believed a fair surmise that, had the United States insisted on trying each parcel or tract to a separate jury, the appellants would have protested vehemently. Admittedly, the jury trying a single isolated building could not have received a true picture showing its value in the context of a part of the whole. Similarly, if different juries had tried the term taking or the fee taking separately, as appellants urge, they would, in the aggregate, have spent more time and cost more money to achieve a less fair result because they would not have the over-all picture.

There is no dispute on the applicable law, nor was there in the trial court. The two federal cases which deal with the question of separate trials for the taking of related property announce essentially the same rule. "Because of the complex and variable nature of such factors in modern conditions, the law very wisely allows the trial judge a broad discretion as to

methods which shall be used in accomplishing the best results, and an appellate court should not insist upon substituting its own judgment by selecting something else, merely for the reason it seems a better choice." *Gwathmey* v. *United States,* 215 F. 2d 148, 153 (C.A. 5, 1954). "A condemnation proceeding brought against owners of several tracts of land is one suit. The several answers may in the discretion of the court be given separate trials. Discretion in this case was exercised by impaneling one jury for all * * *, and then giving to these appellants in effect a separate trial before that jury, followed by a separate verdict on their land, and a separate judgment.[9] We find no such confusion or prejudice to have resulted as would show an abuse of discretion." *Atlantic Coast Line R. Co.* v. *United States,* 132 F. 2d 959, 962 (C.A. 5, 1943). The appellants were in agreement in the court below that the matter of a separate trial was within the discretion of the court (R. 307, 323). Apparently, appellants are still of the same view since they attack the action of the district court as an "abuse of its discretion" (Br. 16).

The handling of this case by the district court, far from being an abuse of discretion, showed great competence, skill and ability. The jury was given more assistance than a jury normally receives even in long and complicated cases. From time to time during the trial, the jury was told the purpose of the introduc-

[9] There was apparently some question in the trial court whether the verdicts for the over 200 parcels were returned severally and at different times. Mr. McPherson made a further inquiry to find that a single verdict had been returned (R. 355–356).

tion of particular classes of evidence, the law applicable thereto and the facts it would have to decide. When it retired to the jury room to deliberate it had before it, summarized in exhibits, practically all of the really determinative factors in the case. It had all comparable sales and leases in Exhibits 25–S, 33, 57 and 57–1 (R. 2160, 2167, 2168, 2169). All of the pertinent data about these sales and leases were compiled in easily comprehensible tabular form, size, location, description of improvements, dates, terms, rents, rents averaged per square foot per month, and sales price averaged per square foot of building and open space. The jury had before it the summary of each expert's testimony on both the fee and the term takings (R. 2159, 2161, 2162, 2163, 2164, 2165, 2170, 2171, 2172, 2173, 2175, 2176, 2177, 2189, 2191, 2192, 2193, 2195, 2196, 2197). Again, all these exhibits illustrating the expert's opinion were clearly tabulated by parcel or tract to explain the basis of the opinion.

The capitalization of income approach was summarized for the jury (R. 2179–2188). The income was capitalized for the property as a whole, and each major building of the fee taking was listed separately on an exhibit illustrating how to arrive at fair market value by capitalization of income. The trend of prices of real estate in the San Diego area was also illustrated for the jury by an exhibit (R. 2194. There were other exhibits, maps, photographs, and mathematical illustrations, to refresh the jury's recollection of this property with which it had become intimately familiar through the several months of testimony. The jury had seen the property. It heard detailed

descriptions of its condition. It had heard the preparations, the factors, the reasons, the highest and best uses, and the fair market values repeated 14 times with variations, so that even a juror learning by pure rote should have almost been qualified to take the stand and testify as an expert himself.

What is perhaps most gratifying is that the jury stayed out for over two weeks, giving itself plenty of time to deliberate and consider the evidence and exhibits carefully. One could have been very suspicious had it returned with its verdict in a mere two or three days that it had not considered all the evidence. But the awards and the length of time it spent in arriving at them indicate that all evidence was reviewed and properly weighed.

The appellants (Br. 30–31) make much of the fact that the award for one tiny tract of vacant land was higher than the opinion of any expert. Viewed objectively, throughout the trial Tract A–106 was given the minutia treatment it deserved. That the appellants considered it insignificant is indicated by the fact that their highest testimony for the tract was $10,000, given by Mr. Culver out of a total valuation opinion in excess of $10,000,000 (R. 2175). In other words, they thought it was $\frac{1}{10}$th of 1 percent of the total. Small wonder in these circumstances the jury probably did not spend a great deal of time on this tract, and in the process awarded more than the expert testimony would indicate was proper. Other than this one minor matter, the jury has a perfect record for all the awards and interrogatories.

The appellants make many superficial comparisons between this case and the *Gwathmey* case, *supra,* e.g., number of pages in the transcript, number of days in pre-trial and jury deliberation, and total dollars involved in the award (Br. 24). These things may be of some importance, but it can hardly be a *prima facie* case that the jury was confused because the trial lasted 17 weeks or the awards totaled in the millions of dollars. It is also somewhat misleading to state of the *Gwathmey* case that the jury awarded compensation for "the 50 separate tracts owned by the group appellants" (Br. 24). In fact, the jury returned verdicts on 238 separate tracts. 215 F. 2d 148, 156. In *Gwathmey* the tracts were combined only because they were being condemned for a single governmental purpose and separate trials individually or in small groups was a possible alternative. Appellants would be the first to reject such a trial of this property, which they claim may be best used as a single, unified, industrial plant. Further, the court said in *Gwathmey* that, of the 50 tracts which were in the appeal, "It may well be that upon remand, having been reduced considerably by the failure of many landowners to appeal, this case can be fairly tried in one proceeding before one jury." 215 F. 2d 148, 158. The jury in the *Gwathmey* case apparently had nothing but its own notes in the jury room, while here the jury had exhibits illustrating practically all the essential information in the case. 215 F. 2d 148, 153–154, 156. In the *Gwathmey* case, lack of due process was shown because counsel had been misinformed about when evidence on their particular tracts would be

presented, and because the cross-examination came so long after the direct evidence as to be ineffective. 215 F. 2d 148, 154. Appellants here claim no such procedural error.[10] Plainly, the differences make this case and the *Gwathmey* case readily distinguishable and fortify the conclusion that the district court here acted with fairness, prudence and without abuse of discretion in any manner.

In final analysis, appellants' argument, that the case was so complex it was impossible for the jury to understand it, is based simply on the length of the record. Even a simple case may be garbled so badly in presentation as to be unintelligible. On the other hand, the most complex cases can ultimately be resolved to understandable issues. We do not deny that the case would require considerable study to understand, nor that many subsidiary issues of fact and law were raised in these proceedings. But to determine whether, when the jury received the court's instructions and retired, it was reasonably probable that as an intelligent group it could understand the issues, one must understand the record. We do not, of course, expect this Court to read the entire original transcript, nor even the condensed printed record. To assist this Court, we have set forth a rather full "Statement" (*supra,* pp. 8–73), deleting to the best of our ability mere repetitions, of the case as it was

[10] Although the district court did not allow appellants to pursue certain lines of inquiry on cross-examination because it was beyond the scope of the direct and involved matters occurring after the date of taking, they were given every opportunity to make a timely cross-examination and were fully advised as to when the evidence was to be presented.

presented to the jury. When the Court reads this summary it will be easy to see why the transcript is over 7,000 pages. The record is a vast tautology of seven experts saying basically the same things from different viewpoints. Nearly 2,000 pages of the record were hearings out of the presence of the jury. When the fact that everything was said seven times in the term taking and seven times in the fee taking is acknowledged and the non-jury hearings accounted for, the record does not appear nearly so formidable.

Similarly, when one understands the record, the quotations out of context made in appellants' brief, pp. 19–22, are perfectly understandable and would occasion no confusion. For example, the consideration passing between Mr. Carlstrom and the charitable organizations was never given to the jury except one reference in appellants' opening statement. The stricken leases would not have bothered the jury for the simple reason that all admissible leases were before the jury on Exhibits 25–S and 33. The railroad parcels were withdrawn from the jury's consideration, and it can be shown that it understood the withdrawal because it made no award for these parcels. The court's instruction to disregard the attempt to give the jury a set of figures from which it could calculate reproduction cost new of these buildings is explained in our Statement, *supra,* pp. 58–60. Even if the jury used the forbidden percentage figure, it would hardly be to appellants' detriment, nor could they have just grounds for complaint. The

other quotations out of context are as easily explainable, but we shall not elaborate the point further.

In summary, the trial of this case was conducted to present the evidence and issues to the jury in an easily comprehensible manner. Appellants would require a new trial to divide the case into two—the term taking and the fee taking. They fail to show, however, how that would substantially change the situation. There is, we submit, no warrant for imposing such a procedure which, at best, would be time-wasting and might well prejudice the Government by overlapping awards. Cf. *Phillips* v. *United States,* 243 F. 2d 1 (C.A. 9, 1957).

II

THE COURT WAS CORRECT IN ITS MISCELLANEOUS RULINGS ON EVIDENCE OF WHICH APPELLANTS COMPLAIN

A. *Evidence of the cost of rehabilitating the property for its highest and best use is a properly admissible factor to be considered by the jury.*—Mr. John Hallock testified for the Government on the condition of the property on the date the Government was given possession, May 1, 1953 (R. 671–1005). Mr. Hallock determined the state of repair of each building, and what, if anything, would be required "to bring it up to a standard of normal maintenance, to make it a useful facility for industrial or commercial work" (R. 677–678). In enumerating the repairs and rehabilitation required Mr. Hallock used photographs of the specific defects to illustrate the type of repairs needed. Appellants conceded in the

court below that these photographs "may be true and correct representations of the particular area that is involved in the photograph * * *" (R. 682). They objected, however, that such photographs were not "a true, correct and full representation of the entire property * * *". (*Id.*) Of course, they were presented to the jury only as "specific pictures and closeups of particular defects * * *" (R. 689–690). At the same time the court told the jury the nature of the photographs, it added that "there are areas where no defects appear, but the Government has taken no pictures of these areas" (R. 690). Under the circumstances in which they were introduced, the photographs could not possibly have been misleading. Appellants waived foundation at the time the photographs were introduced, and agreed the pictures depicted what they purported to depict (R. 689). It hardly needs discussing that photographs under the facts here are admissible evidence. As Wigmore says, "A photograph, like a map or diagram, is a witness' pictured expression of the data observed by him and therein communicated to the tribunal more accurately than by words. Its use for this purpose is sanctioned beyond question." Wigmore on Evidence, Sec. 792 (3d ed.). Whether particular photographs will be allowed is a matter in each case that lies within the discretion of the trial judge. *Millers Nat. Ins. Co.* v. *Wichita Flour Mills,* 257 F. 2d 93, 100 (C.A. 10, 1958); *Luther* v. *Maple,* 250 F. 2d 916, 921 (C.A. 8, 1958); *Drohan* v. *Standard Oil Company,* 168 F. 2d 761, 765 (C.A. 7, 1948).

Appellants also claim it was objectionable to allow Mr. Hallock, after he recited the defects to estimate how much it would cost to bring the property to a condition where it would be useful and usable. Where this question was raised, the court held that it is reversible error to exclude testimony as to the amount that would be necessary to be expended to make a property usable for its highest and best use. *Hickey* v. *United States,* 208 F. 2d 269, 276–277 (C.A. 3, 1953), cert. den. 347 U.S. 919. Obviously, an intelligent buyer of property would be vitally concerned with how much it would cost to rehabilitate such property, especially where, as here, there was serious and extensive maintenance work that needed to be done (R. 690–797).

Kinter v. *United States,* 156 F. 2d 5 (C.A. 3, 1946), on which appellants rely in their brief, is not germane to the issue appellants raise here (Br. 36). As the court of appeals for the Third Circuit in the *Hickey* case, *supra,* pointed out, the question in *Kinter* was whether the landowner should be allowed to recite the cost of *past repairs* to support his opinion of market value. The *Kinter* case is absolutely correct in its holding, but is not applicable here because the United States was not trying to introduce the cost of *past* repairs to this property. It only wanted to show how much a purchaser could expect to have to pay out of pocket on the date of taking to repair the property.

B. *The district court ruled correctly and within the scope of its judicial discretion by eliminating from the cross-examination of Mr. Hallock repetitious and remote questions that threatened to prolong the trial*

greatly.—The specific question about which appellants are complaining in their point II B (Br. 37–42) is this: "Q. Do you have any knowledge as to whether or not the sewer facilities that you have been referring to have been done [repaired?] during the period from May 1, 1953 down to the present time" (R. 995–996)? The purpose of this question, according to counsel for appellants, was to test the credibility of Mr. Hallock's opinion that the condemned properties were "not a useful facility for industrial purposes during the period of time that I inquired about" (R. 996). Counsel for appellants further elaborated that he felt he was "entitled to test the credibility of this witness' opinion that certain things must be done to make it a useful property for industrial purposes, to find out whether or not it's operated for four or five years without it" (R. 997). To this argument the court cogently remarked that "The witness has stated to you in reply to your questions, Mr. Burrill, that this question of usefulness is a matter of degree. And he has given several examples which seem intelligent to me. And I think they were probably understandable to the jury" (R. 997–998).

Some of the questions the court referred to appear in the immediately preceding colloquy beginning at page 989 of the printed record. Counsel for appellants there also wanted to test Mr. Hallock's opinion "* * * that all these things were necessary * * * for the operation of this property for an industrial purpose. And, as I further understand his testimony, that he said that it was essential that they be done promptly as of May 1, 1953" (R. 990). Mr. Hallock

immediately denied that such had been his testimony. Mr. Hallock's prior testimony was then read, and the operative phrase was, "to bring it up to a standard of normal maintenance, to make it a useful facility for industrial or commercial work" (R. 990–991). Mr. Hallock was then questioned extensively on this subject, and explained "* * * maintenance can be deferred and deferred and deferred until a building falls down, if you want to" (R. 992). Without the maintenance, the property "could be useful, but not fully useful" (R. 993). He gave as an example that certain blackout curtains inhibited the lighting, and one cannot have efficiency with poor lighting. Counsel for appellants wanted to know, "Isn't it a fact that those blackout curtains have not been removed up to the present time?" Mr. Hallock replied that is a fact, and that the reason for it was that money had not been forthcoming to Convair from the Government to do the work (R. 993). Counsel for the appellants then branched out into other fields. He asked about repair on the heaters between January 1, 1951, and May 1953 (R. 994). He asked about toilet facilities and transformers (R. 995). He then went into the question about sewer repairs quoted above during the period between May 1953 and the date of trial. The court quite properly felt that the line of inquiry was getting too remote and sustained the objection to the question (R. 996). "To open up a question of what had been done thereafter [after May 1953] would be to multiply this case endlessly. We would then have problems as to how much of the work, if all, was done, why it was done; what judgment was

used and what was done or what was not done. And none of it would be of assistance in judging the opinion of this witness" (R. 996).

The objectionable line of questioning came after Mr. Hallock's cross-examination had proceeded for a full day and a half, and covered over 200 pages of the record. The cross-examination had touched specifically on what constituted a useful facility, deferred maintenance, and whether the plant had in fact been used without the repairs being made, at least three times prior (R. 813–815, 829–831, 980–982). The witness was cross-examined extensively on every item and cost on his rehabilitation report (R. 815–1005). It is plain from the record that the witness was speaking in his rehabilitation report of repairs that "ought to be" and not necessarily of those that "have to be". Even the simplest person knows the difference between repairs that ought to be made to property and those that actually get done. Certainly this blue ribbon jury understood what Mr. Hallock was talking about. The court was surely correct when it noted that going into what repairs were actually made, when and why, after May 1, 1953, was not a vital necessity to the jury in judging this witness' opinion.

When dealing with evidence, such as the condition of the property, relating directly to value, the district court had wide discretion. As this Court said in *United States* v. *Block,* 160 F. 2d 604, 607 (1947), "In proceedings of this character, a judicial discretion in admitting or rejecting evidence as to value is vested in the trial court, and where no abuse of that discretion is shown, such rulings should not be disturbed on

appeal." *Stephens* v. *United States,* 235 F. 2d 467, 471 (C.A. 5, 1956); *Foster* v. *United States,* 145 F. 2d 873, 875 (C.A. 8, 1944); *Ramming Real Estate Co.* v. *United States,* 122 F. 2d 892, 895 (C.A. 8, 1941). There was certainly no abuse of discretion in the action of the trial court here to limit remote and repetitious cross-examination.

The United States is aware, of course, that a few cases indicate under severely restricted conditions, facts occurring after the date of valuation may be shown as tending to prove or disprove the accuracy of an opinion formed at the date of valuation. The cases, when properly limited, are correct. Thus, in *United States* v. *Westinghouse Co.,* 339 U.S. 261, 267–268 (1950), the court indicated that in valuing the taking of an indeterminate portion of the term of a leasehold estate, it would be proper to wait until the length of the taking was definite to see if moving costs should be allowed. In *United States* v. *Brooklyn Union Gas Co.,* 168 F. 2d 391, 397 (C.A. 2, 1948), they were valuing the taking of a portion of a public utility system, and it was held proper to see if the utility had in fact lost any business because of the taking. Also in *Hickey* v. *United States,* 208 F. 2d 269, 277–278 (C.A. 3, 1953), cert. den., 347 U.S. 919, where an engineer formed an opinion on the condition of covered plumbing and heating systems as of the date of valuation, he was permitted to say that after the date of valuation when the pipes were uncovered his opinion was verified. If in this case, appellants had merely wanted Mr. Hallock to testify whether any subsequent inspection of the property verified or re-

futed his opinion of the repairs necessary, that might have similarly been admissible. But appellants wanted to go far beyond this. They wanted him to testify to all repairs that had been made, and the general history of the property in this respect from the date of valuation until the trial. In final analysis the case would have been thrown wide open to everything that had happened at the plant up to the time of the trial. The district court wisely observed that it was immaterial after the date of valuation whether the plant fell into the ocean (R. 982, 997). This is in accord with the general rule that valuation of land in a condemnation proceeding must be determined as of the time of the taking. *United States* v. *Miller,* 317 U.S. 369, 374 (1943); *Danforth* v. *United States,* 308 U.S. 271, 283 (1939); *McKendry* v. *United States,* 254 F. 2d 659, 662 (C.A. 9, 1958). As this Court said in *State of Washington* v. *United States,* 214 F. 2d 33, 47 (1954), cert. den., 348 U.S. 862, "A condemnation case involves a taking, as of a certain date, and the case is tried with the eyes of the court and jury fastened to the date of taking, and some short but reasonable period before or after the taking." Therefore, the rejection of questions about general repairs up to the time of the trial was proper because it concerned events long after the date of taking in addition to being evidentially remote and repetitive.

C. *Reproduction costs are not a reliable guide to fair market value and were properly rejected as direct evidence in this case where other evidence of a more trustworthy nature was available.*—The defendants made an offer to prove that the cost of construc-

tion new of the buildings and facilities condemned here, except Building 8 and other facilities located on Parcel 1, as of May 1, 1953, was $15,069,140, and the cost new less depreciation, including straight line depreciation, functional depreciation and deferred maintenance, would be $9,217,397 (R. 1035). The matter was discussed at some length in chambers (R. 1031–1048). Next day the court made its ruling as follows:[11]

> First, I am going to sustain an objection to the introduction in evidence of expert testimony of dollars and cents value as to reproduction costs, reproduction costs less depreciation, or reproduction costs new less depreciation, whatever way it might be offered. Tr. 1903; 164 F. Supp. 451, 488.
>
> Now, on the other hand, I am going to permit the experts for the defendants to state, in general terms, what factors they took into account in arriving at their opinion, including a statement by them, if they desire, that they took into account a factor of reproduction cost less depreciation. Tr. 1905; 164 F. Supp. 451, 489.

The district court's reasons for its ruling as stated in the accompanying discussion will be elaborated on momentarily. The court instructed the jury on the use of expert opinion on reproduction costs in two places

[11] The same opinion, revised somewhat for publication, is reported in *United States* v. *70.39 Acres of Land*, 164 F. Supp. 451, 488–490. This appeared in the original trial transcript at pp. 1903–1910. The district court has also summarized the argument of counsel in chambers on this question. 164 F. Supp. 451, 488. In the original transcript the material is found at pp. 1655–1691, 1729–1754. Most of this has not been included in the printed record.

(R. 1917–1922, 2097–2098). The substance of these instructions is contained in these two paragraphs (R. 1918, 2098):

> The problem we got into involves this matter of reproduction cost new less depreciation. Now reproduction cost new less depreciation is not market value, and therefore the court has excluded evidence as to the figures on reproduction cost new. Certain experts, the defendants' experts that you have heard testify, have said that in forming an opinion they considered reproduction cost new less depreciation as a check against some opinion they arrived at as to fair market value. That the court has permitted. The expert may express to you his reasoning process in arriving at his opinion of fair market value. But the defendants' experts, each of them, have disclaimed that reproduction cost new less depreciation was market value, but that instead it was merely a check. To that extent it was permissible.
>
> Reproduction costs new, less depreciation, plus the value of the land, is not fair market value. However, reproduction costs new of the improvements located on the various parcels, less depreciation, plus the land value, may be considered by an expert witness as one approach in forming his ultimate opinion of fair market value or as a check upon his final opinion of fair market value. This would apply both to valuation of the term taking and the fee taking.

The district court gave three reasons for excluding from evidence the reproduction cost less depreciation of the improvements. First, the compensation in a condemnation case is fair market value, and reproduc-

tion cost is remote from and has little bearing on fair market value. Second, the introduction of expert testimony on reproduction costs separately values the buildings from the land. Third, the introduction of reproduction costs tends to mislead the jury in fixing what a willing buyer would pay a willing seller in the market place, and would divert them from their consideration of comparable sales as the best evidence of value (Tr. 1903–1905; 164 F. Supp. 451, 488–489).

The measure of just compensation in a condemnation case is fair market value, and the best evidence of fair market value is comparable sales. *United States* v. *Toronto Nav. Co.*, 338 U.S. 396, 402 (1949); *United States* v. *Petty Motor Co.*, 327 U.S. 372, 377 (1946); *United States* v. *Miller*, 317 U.S. 369, 373–375 (1943); *Olson* v. *United States*, 292 U.S. 246, 255–257 (1934); *Cole Investment Co.* v. *United States*, 258 F. 2d 203, 205 (C.A. 9, 1958); *Goodyear Farms* v. *United States*, 241 F. 2d 484, 485 (C.A. 9, 1956); *Simmonds* v. *United States*, 199 F. 2d 305, 307 (C.A. 9, 1952); *United States* v. *5139.5 Acres of Land*, 200 F. 2d 659, 662 (C.A. 4, 1952); *United States* v. *Ham*, 187 F. 2d 265, 270 (C.A. 8, 1951); *United States* v. *Pennsylvania-Dixie Cement Corp.*, 178 F. 2d 195, 198–200 (C.A. 6, 1949); *Kinter* v. *United States*, 156 F. 2d 5, 7 (C.A. 3, 1946); *Fain* v. *United States*, 145 F. 2d 956, 957 (C.A. 6, 1944); *Baetjer* v. *United States*, 143 F. 2d 391, 397 (C.A. 1, 1944); *Love* v. *United States*, 141 F. 2d 981, 983 (C.A. 8, 1944); *Welch* v. *Tennessee Valley Authority*, 108 F. 2d 95, 101 (C.A. 6, 1939).

Where there is a market price for the property condemned established by contemporaneous sales in

the open market that price is "just compensation" and other evidence of "value", such as capitalization of income or reproduction costs, would not be pertinent at all. *United States* v. *New River Collieries,* 262 U.S. 341, 344 (1923); *Vogelstein & Co.* v. *United States,* 262 U.S. 337, 340 (1923); *St. Joe Paper Co.* v. *United States,* 155 F. 2d 93, 96–97 (C.A. 5, 1946); *W. T. Grant Co.* v. *Duggan,* 94 F. 2d 859, 861 (C.A. 2, 1938); *Olson* v. *United States,* 67 F. 2d 24, 29 (C.A. 8, 1933), affirmed 292 U.S. 246, 257 (1934). Of course, this perfect market price is mostly found in fungibles such as coal or copper, as in the *New River Collieries* and *Vogelstein* cases. In real property there are rarely enough transactions involving identical property to give such an indisputable market price. Usually, as in the present case, there is some dispute as to the extent to which sales are comparable. But this does not change the objective in valuing property, i.e., what a willing buyer would pay a willing seller when neither are acting under compulsion. It simply renders proof of this more difficult, and calls for weighing the incomparable elements of similar sales along with the comparable elements. *United States* v. *Toronto Nav. Co.,* 338 U.S. 396, 402 (1949). Thus, in the present case there were over 50 recent sales of industrial and commercial property in the vicinity of Convair Plant #2, although admittedly none of them was as large as most of the parcels and tracts at the plant, except the two sales involving this same plant (R. 2168–2169). But this difference of size was merely an element to be taken into consideration, with these sales of similar

type properties still the best evidence of fair market value. The jury also had before it the testimony of the experts on capitalization of income and their opinions of fair market value taking into account all three factors.

It was certainly not error in these circumstances for the district court to exclude an extended discussion of the collateral issue of the cost of reproducing the buildings. Of the standard approaches which experts use in valuing property, reproduction cost almost universally has been discussed for its infirmities and been thoroughly discredited by so many courts. As the Supreme Court said in *United States* v. *Toronto Nav. Co.,* 338 U.S. 396, 403 (1949): "Original cost is well termed the 'false standard of the past' where, as here, present market value in no way reflects that cost. So with reproduction cost, when no one would think of reproducing the property." One of the earliest cases to consider the problem, *Devou* v. *City of Cincinnati,* 162 Fed. 633, 635 (C.A. 6, 1908), cert. den., 212 U.S. 577, stated: "It seems clear to us that the effort of the defendant below was not to enlighten, but rather to confuse and mislead, the jury from a consideration of the actual value of the land and buildings as they are now into a consideration of their cost, of what they might be valued at as buildings alone, irrespective of the ground." In *United States* v. *44.00 Acres of Land,* 234 F. 2d 410, 412–413 (C.A. 2, 1956), cert. den., 352 U.S. 916, it was held that a valuation of an industrial building based primarily on reproduction cost new less physical depreciation and the cost of the land was erroneous, and

Orgel's work, *Valuation Under Eminent Domain* (1953 ed.), sec. 188, is quoted as follows:

> It is not difficult to understand the modern appraiser's skepticism of land value plus structural cost as a measure of the market value of improved real estate. Such a figure would be acceptable only on the assumption that the buyer of the property would want to erect a substantially identical structure in case the existing one were not there. The market value of the mere land is a value that can be availed of by the owner only by erecting on it that type of building which is now best adapted to it. But if the existing building is not of that type—which is almost sure to be the case in this dynamic age, unless the structure is very new—then the improvement does not enhance the value of the whole property by the amount of the reproduction cost. * * *

In *Kinter* v. *United States,* 156 F. 2d 5, 7 (C.A. 3, 1946), the court stated, "Admittedly, cost is not synonymous with market value. *A fortiori,* cost of land and cost of improvements taken separately and added are not to be equalized with fair market value."

"There is no necessary relationship between reproduction cost and market value," held the Court of Appeals for the District of Columbia Circuit in *Riley* v. *District of Columbia Redevelop. Land Agency,* 246 F. 2d 641, 644 (1957). For another authority discussing the unreliability of the reproduction cost approach to valuation see *United States* v. *49,375 Square Feet of Land in Manhattan,* 92 F. Supp. 384, 387–388 (S.D.N.Y., 1950), affirmed *per*

curiam sum nom. United States v. *Tishman Realty & Construction Company,* 193 F. 2d 180 (C.A. 2, 1952). In rejecting reproduction and original costs the Fifth Circuit in *Bowie Lumber Co.* v. *United States,* 155 F. 2d 225, 228–229 (1946), said:

> The refusal of the court to permit owners to introduce evidence touching the original cost of the building on a cubic foot basis, and also the estimated cost of the reproduction of the Poydras Building was not prejudicial error. Manifestly, such evidence was remote in point of time as to original cost. [Citing authorities.]
>
> It could not be helpful to the jury to permit evidence of the reproduction of the building by owner's witness, the Assistant City Architect. The building had stood for over forty-six years and the cost of reproduction in the year 1943 would, in all probability, mislead the jury.

Even in those cases where reproduction costs have been considered, the courts have repeatedly felt it necessary to caution on the limitations and frailties of this type of evidence. Thus, the Supreme Court in *Standard Oil Co.* v. *Southern Pacific Company,* 268 U.S. 146, 156 (1925), warns: "It is to be borne in mind that value is the thing to be found and that neither cost of reproduction new, nor that less depreciation, is the measure or sole guide."

In *United States* v. *Savannah Shipyards,* 139 F. 2d 953, 956 (C.A. 5, 1944), reh. den. 140 F. 2d 863, the court cautions:

> * * * in view of the fact that the issue in condemnation proceedings is not the cost of production or reproduction, but the fair market

> value, proof as to the reproduction cost or production cost is collateral to the real issue. Recent cost of construction is merely a circumstance that the jury might consider as having some bearing on fair market value in situations *where there is no available evidence of market value. * * * If the actual cost of construction had been ascertained to the penny, the jury would still have been required to ascertain fair market value* * * * [Emphasis added.]

In *United States* v. *Wise,* 131 F. 2d 851, 852 (C.A. 4, 1942), the court would hold only that the admissibility of reproduction costs "is largely governed by the peculiar circumstances of each case and rests to a great extent in the discretion of the trial judge." Even so, the court felt it necessary to quote at length the charge to the jury by the district court that reproduction cost was not the measure of compensation, and the limitation on its use. It was held in *United States* v. *Boston, C.C. & N.Y. Canal Co.,* 271 Fed. 877, 889 (C.A. 1, 1921), that reproduction costs could not be considered unless the court or jury was first satisfied "that a reasonably prudent man would purchase or undertake the construction of the property at such a figure." The district court obviously could not have made the required affirmative finding in this case. In practically all the cases where the introduction of this type of evidence has been upheld, the circuit courts have been careful to point out either the uniqueness of the property, or the absence of any comparable sales or other type evidence on which to base an award. See, for example, *United States* v. *2.4 Acres,* 138 F. 2d 295, 298 (C.A. 7, 1943) (no

sales); *United States* v. *Savannah Shipyards,* 139 F. 2d 953, 954 (C.A. 5, 1944), reh. den., 140 F. 2d 863 (no comparable sales of shipyards in the course of construction); *United States* v. *Two Acres of Land,* 144 F. 2d 207, 209 (C.A. 7, 1944) (church property); *United States* v. *Boston, C.C. & N.Y. Canal Co., supra* (condemnation of a canal). By contrast, see the cases relying on comparable sales, *supra,* p. 99. None of them feel it necessary to explain why other approaches to value are not used. Obviously, all of these cases together point out why courts reject reproduction costs where any other standard of value is available. The district court properly rejected appellants' offer to prove reproduction costs of the buildings for the reasons stated in its opinion, to wit: such costs are remote from the issue of fair market value, and their introduction would tend to mislead the jury as to what the true measure of compensation is.

If further reason be needed, the district court was also correct in stating that such evidence is a separate valuation of the buildings from the land. This likewise tends to confuse the jury and leads to a piecemeal valuation of the property. This Circuit has announced its intention to follow the established rule in *United States* v. *Honolulu Plantation Co.,* 182 F. 2d 172, 178 (1950), where this Court said: "It is likewise perfectly true that the land cannot be valued alone without buildings or other structures which have been added thereto and which are a part of the real property. According to common law, these are as much a part of the soil as are the rocks,

sand and other natural features." Other cases which follow this view are *United States* v. *Certain Parcels of Land,* 149 F. 2d 81 (C.A. 5, 1945); *United States* v. *Meyer,* 113 F. 2d 387, 397 (C.A. 7, 1940); *Morton Butler Timber Co.* v. *United States,* 91 F. 2d 884, 888 (C.A. 6, 1937).[12] For this additional reason, there was no error in rejecting reproduction cost new less depreciation of the buildings and improvements.

D. *Government needs for a particular type of property cannot be considered in determining just compensation.*—To be clearly understood, the introduction and subsequent striking of certain Convair leases from the evidence before the jury must be presented in the correct time sequence. When the first real estate expert, Mr. Sayer, was testifying, the question arose as to whether certain leases made by Convair as a government contractor of the subject property should be admitted in evidence. There was a long discussion of the issue in chambers which has not been printed (Tr. 2150–2269). The court initially ruled that the leases between Convair and

[12] This is not to suggest that in valuing the property as a whole an expert cannot state how much of the total a building or other improvement contributed. As was said in the *Meyer* case, "All of the facts and circumstances bearing upon the condition and nature of the land as a whole and its possible use are proper as elements bearing upon value, but separate appraisements of the different elements constituting the whole are improper." 113 F. 2d 397. See also *United States* v. *City of New York*, 165 F. 2d 526, 528–529 (C.A. 2, 1948). To have allowed the witnesses for appellants to go through the involved process of calculating reproduction cost new less depreciation of the buildings would have been just such a "separate appraisement" of a fractional part of the whole and would have tended to divert the jury from the real issue.

Carlstrom could be referred to by the experts just as any other comparable leases (Tr. 2217). Following the doctrine announced by the Supreme Court in *United States* v. *Cors,* 337 U.S. 325, 333 (1949), the court ruled it would be a jury question whether needs of the Government influenced the rentals paid.

In order that the jury might appreciate the facts being developed as the case progressed, the court gave the jury a summary of the contentions the parties were making with regard to these leases (R. 1223–1228). In this connection the court instructed that if there had been a general increase in value throughout the area due to government activities, such as the Navy Base, Air Station and government contractors generally, and if the Convair leases are in line with such general increase throughout the area, then these leases could be considered the same as any other (R. 1226–1227). "If on the other hand, in the Convair leases and the rentals provided there is an increment or increase not caused by the general condition in the area, but caused by the necessity of the Government acting through Convair, the contractor, for storage space and other facilities—in other words, for facilities for the particular kind as are involved in this case in the particular area nearby the Convair Plant No. 1, then such increment must be segregated by the jury and not considered in arriving at fair market value" (R. 1227). Mr. Sayer then testified about the Convair leases. (See Statement, *supra,* pp. 28–29.)

When the Government presented its case on the term taking, it sought to show by its first witness that

Convair was the agent of the United States, that the rentals were in fact largely paid by the United States and that the price and circumstances indicated that they were entered into on the compulsive need of the Government's agent for this particular type of property (R. 1423–1507). Mr. Robert B. Watts, vice president and general counsel of Convair at San Diego, who was in charge of real estate matters, was the witness for this purpose (R. 1423). Mr. Watts' testimony has been summarized in the Statement, *supra,* pp. 37–40. To illustrate his testimony, Exhibit J had been prepared, which named the various contracts between the Government and Convair and gave certain pertinent data, such as dates, type of contract, subject matter of the contract, whether Convair was prime or subcontractor, etc. (R. 1444–1451). The exhibit was admitted over appellants' objection "merely to illustrate the testimony which the witness will give concerning the contracts and their performance at San Diego with the Government for military equipment" (R. 1451). Mr. Watts' accompanying evidence brought out that Mr. Carlstrom was reluctant to lease the Convair people additional space in Plant #2 under any circumstances, and would only do so after they threatened condemnation and Mr. Carlstrom demanded and got an increase in rentals (R. 1463–1464).

Again at the beginning of the fee valuation the United States moved to exclude these Convair leases, "upon the grounds that those leases represent the compulsion which was attended by the Government's military necessity, as shown by the testimony of Mr. Watts * * *" (R. 1740). This time the court sus-

tained the Government's motion (R. 1745). The court thereupon instructed the jury to forget any Convair leases entered after January 1, 1951, with one exception, and they were removed from Exhibit 25 (R. 1754).

In a later discussion clarifying exactly what portion of the transcript and exhibits it was necessary to strike to eliminate the stricken Convair leases, the question arose as to whether the terms of the leases other than rental paid should also be stricken (Tr. 5154–5164). Counsel for the appellants argued that "the leases are also offered on the issue of whether there was reasonable probability of unitization, *irrespective of the rental values fixed in the leases*" (Tr. 5156; emphasis supplied). The court called for more argument on whether the "leases would still have, as to area, location and so forth, some value on the unitization question" (Tr. 5161). At the conclusion of this argument the court ruled, "I am leaving the unitization question to the jury, and I will let them consider the leases as to area, location and so forth on the unitization question, but not the rents" (Tr. 5164).

Under the circumstances of this case it is somewhat surprising to see appellants (Br. 47) "respectfully submit that it was the duty of the trial court to admit all the evidence and exhibits respecting the Convair-Government contracts and Convair-Carlstrom leases or else to reject all of it." For all practical purposes the court *did,* at appellants' insistence, admit all of this evidence except those portions which were clearly inadmissible, i.e., the rentals. As for the testimony of Mr. Watts on aircraft manufacturing con-

(C.A. 2, 1944), cert. den., 323 U.S. 726 (1944). It provides no realistic or fair standard by which to judge the market.

It is a fundamental principle in determining just compensation that "special value to the condemnor as distinguished from others who may or may not possess the power to condemn has long been excluded as an element from market value." *United States* v. *Cors,* 337 U.S. 325, 333 (1949); *United States* v. *Miller,* 317 U.S. 369, 375 (1943); *United States* v. *Chandler-Dunbar Co.,* 229 U.S. 53, 76 (1913). In *United States* v. *Petty Motor Co.,* 327 U.S. 372 (1946), the court said (p. 377) that the value of the interest taken "is not the value to the owner for his particular purposes or to the condemnor for some special use but a so-called 'market value.'"

That principle has led to the rule in the federal courts (including this Court) that the amounts paid by the condemnor for the same or other property are not even evidence of market value, and, therefore, are not admissible on that issue. *Justice* v. *United States,* 145 F. 2d 110, 111 (C.A. 9, 1944); *Murdock* v. *United States,* 160 F. 2d 358, 362 (C.A. 8, 1947); *United States* v. *13,255.53 Acres of Land, Etc.,* 158 F. 2d 874, 877 (C.A. 3, 1946); *United States* v. *Foster,* 131 F. 2d 3, 5 (C.A. 8, 1942), cert. den. 318 U.S. 767 (1943); *United States* v. *Reynolds,* 115 F. 2d 294, 296 (C.A. 5, 1940); *United States* v. *Bailey,* 115 F. 2d 433, 434 (C.A. 5, 1940); *Five Tracts of Land* v. *United States,* 101 Fed. 661, 663–665 (C.A. 3, 1900); *United States* v. *Beaty,* 198 Fed. 284, 291 (W.D. Va., 1912), reversed on other grounds, 203 Fed. 620 (C.A.

4, 1913); cf. *Westchester County Park Commission* v. *United States*, 143 F. 2d 688, 693 (C.A. 2, 1944), cert. den., 323 U.S. 726.

Those rulings are plainly applicable in this proceeding. What the Government might be willing to pay, or to have its contractor pay, as rental for the temporary use of land in expanding to meet a war emergency could have no probative value in determining the fair annual rental of such property on the open market.

In *United States* v. *Hayman*, 115 F. 2d 599 (C.A. 7, 1940), proceedings were brought to condemn fee title to land occupied by the United States under a lease and on which it had constructed beacon towers. The landowner argued that market value was enhanced because prospective purchasers would consider the fact that the United States would renew the lease or condemn the fee in order to avoid the expense of removal of the towers. The court sustained the exclusion of evidence to support this contention because it represented special value to the United States. See also *United States* v. *Delaware, Lackawanna & W.R. Co.*, 264 F. 2d 112, 115–116 (C.A. 3, 1959), where evidence of a lease to the Government's contractor was not grounds for reversal only because the ultimate award clearly showed the evidence had been rejected as a basis for evaluation.

It was not seriously disputed as to who was actually paying the rents on the Convair leases, although there was an issue on whether a formal agency relationship existed between Convair and the Government. These rents were placed in an overhead pool, and during the

period subsequent to 1950 the Government paid between 85% and 95% of the total (R. 1502). Not only was the Government paying the bill but the record shows that Convair was in constant touch with the Government with respect to its leases (R. 1464, 1467, 1468, 1469, 1470). It is further clear from Mr. Watts' testimony that all Convair expenditures were being constantly audited by government accountants. Whatever the relationship may be for other questions, certainly for purposes of these leases Convair was the Government's agent. The holding of *United States* v. *Five Parcels of Land,* 180 F. 2d 75 (C.A. 5, 1950), cert. den., 340 U.S. 812, is very pertinent:

> The [Houston] Shipbuilding Corporation was an agency of the United States and for the purposes of this discussion it will be treated as if it were the United States, since the improvement of the lands, the building of the facilities and improvements, the operation of the shipyard, and the building of ships were all for the United States and at its expense.[13]

It having been shown that the excluded leases were used largely for building military aircraft, and that

[13] The situation will be governed by the substantial equitable principles viewing the case as a whole, not by the technical rules of agency. As it was recently said in another condemnation case involving the same fundamental principle of excluding values attributable solely to the Government's needs or activities with regard to the particular property, to view the controversy as one merely between private parties under State law "strips it of its life giving, its flesh and blood, elements" and such cases will not be controlled by "invocation of the dry as dust legal principles as to fixtures controlling the relation of an ordinary landlord and tenant * * *." *Bibb County, Georgia* v. *United States*, 249 F. 2d 228, 230 (C.A. 5, 1957).

the leases were made during the Korean War emergency, with the Government paying most of the rentals and approving such leases, the district court properly excluded them as reflecting only pressing governmental needs and not fair market transactions.

E. *The district court was correct in ruling that the previous sale of the same property and Carlstrom's admissions against interest in a tax proceeding were admissible and in excluding evidence of fair market rental value 14 months after the date of taking.*—We turn now to the three final complaints made by the appellants about the admission and exclusion of evidence (Br. 48–57). With respect to Point E, evidence of what the same property sold for previously has been upheld by the federal courts on numerous occasions and whether a sale is too remote in time is entirely a matter within the discretion of the trial judge. This Court stated the rule in *Simmonds* v. *United States,* 199 F. 2d 305, 307–308 (1952):

> Finally, Simmonds alleges that the District Court committed prejudicial error in admitting testimony of the price which Simmonds paid for Tract No. 7 in 1944 to be admitted as evidence of the 1948 value. He contends that the 1944 purchase date was too remote from the 1948 valuation date to be of any probative value; and that the low purchase price unduly prejudiced the jury in fixing the value of the property. However, compensation for condemned lands is measured by market value, and the price paid at prior sales of the same property, reasonably recent and not forced, are evidence of market value. [Citing *United States*

> v. *Bechtold Co.,* 129 F. 2d 473, 479 (C.A. 8, 1942), and other cases.] * * * Any changes in circumstances between 1944 and 1948, as they affect the value of the property, would go to the weight to be given to the 1944 purchase price, but not to the admissibility of such evidence. United States v. Bechtold Co., supra.

In the *Bechtold* case, relied on by this Court, the Eighth Circuit had held a prior purchase of the same property admissible. "The fact that the purchase was made some fourteen years before the date of taking the property went to the weight of the evidence, rather than to its admissibility. The court in its discretion properly admitted the testimony." 129 F. 2d 473, 479. Other cases holding prior sales of the same property admissible are: *Riley* v. *District of Columbia Redevelop. Land Agency,* 246 F. 2d 641 (C.A.D.C., 1957) (three years prior to date of valuation); *International Paper Company* v. *United States,* 227 F. 2d 201, 208 (C.A. 5, 1955); *United States* v. *Ham,* 187 F. 2d 265, 269–270 (C.A. 8, 1951) (three and five years); *Dickinson* v. *United States,* 154 F. 2d 642 (C.A. 4, 1946) (six years); *Foster* v. *United States,* 145 F. 2d 873, 875 (C.A. 8, 1944) (eight years); *Love* v. *United States,* 141 F. 2d 981, 983 (C.A. 8, 1944) (seven years). Since issues as to comparability are eliminated the courts are more liberal as to the time element in cases of sales of the same property than with comparable sales.

The district court was equally correct in admitting the petitions which Carlstrom made in an effort to have his tax assessment on the subject property re-

duced (R. 1508–1509). "While an actual assessment for taxes made by a public officer is not admissible on a trial to establish market value, a tax return or a statement of value made by the owner is admissible as an admission against interest. McCandless v. United States, 9 Cir., 74 F. 2d 596, 603–4; Dubinsky Realty Co. v. Lortz, 8 Cir., 129 F. 2d 669, 673; Bowie Lumber Co. v. United States, 5 Cir., 155 F. 2d 225, 228; Redman v. United States, 4 Cir., 136 F. 2d 203, 206; * * *." *Murdock* v. *United States,* 160 F. 2d 358, 362 (C.A. 8, 1947). In the *Redman* case, *supra,* which also relies on this Court's decision in *McCandless* v. *United States, supra,* the court said: "It is finally contended on behalf of the appellants that they were prejudiced by the court's ruling admitting in evidence an application, by the appellants sworn to by appellant W. Carroll Redman, for a reduction of the assessed value of the property in question in 1938. * * * The great weight of authority is to the effect that such evidence is admissible under proper instructions by the trial court as to the conditions surrounding the application for reduction in taxation." 136 F. 2d 203, 206. The instructions which the court gave the jury at the time this evidence was received left nothing to be desired in clarity (R. 1629–1636). Indeed, one of appellants' own counsel said, "Without in any way waiving our objections, I think your statement has been an eminently fair statement to both sides, without any question about it" (R. 1636). The court again gave a clear and precise instruction on the tax reduction evidence in its charge to the

jury (R. 2086–2088). The court also had a tag placed upon each of the exhibits relating to reduction of tax assessments to refresh the jury's recollection as to the limited consideration it could give them (R. 2087). Not only was there no error, but the court went a great deal further than the minimum required to be fair to appellants.

The final complaint in appellant's brief about the admission and exclusion of evidence, Point G, is that the court should have heard evidence of the fair market rental value for the lease period from July 1, 1954, to June 30, 1955. The date of the term taking was May 1, 1953, on which date the United States took a term of 14 months and the option to renew for yearly periods thereafter until 1958 (R. 5). This taking, both of the 14-month term and the option to renew, was to be valued as of the date of taking. See *supra,* pp. 95–96. The district court has discussed at length the perfectly plain and logical proposition that by taking and paying for an option to renew the lease, the United States has acquired the right to renew the lease at the same rate of rental. *United States* v. *70.39 Acres of Land,* 164 F. Supp. 451, 463–467. There is nothing which need be added to this excellent opinion. We particularly invite the Court's attention to the fact, noted by the district court, that the United States has the power to take all the additional terms it wants, and therefore has no reason to pay for an option except for the right to renew *at the same rate of rental* (164 F. Supp. 464–465).

CONCLUSION

For the foregoing reasons the judgment of the district court is correct and should be affirmed.

Respectfully,

PERRY W. MORTON,
Assistant Attorney General,
LAUGHLIN E. WATERS,
United States Attorney,
Los Angeles 12, California.
ALBERT N. MINTON,
Assistant United States Attorney,
Los Angeles 12, California.
ROGER P. MARQUIS,
A. DONALD MILEUR,
Attorneys,
Department of Justice, Washington 25, D.C.

SEPTEMBER 1959.

U.S. GOVERNMENT PRINTING OFFICE: 1959